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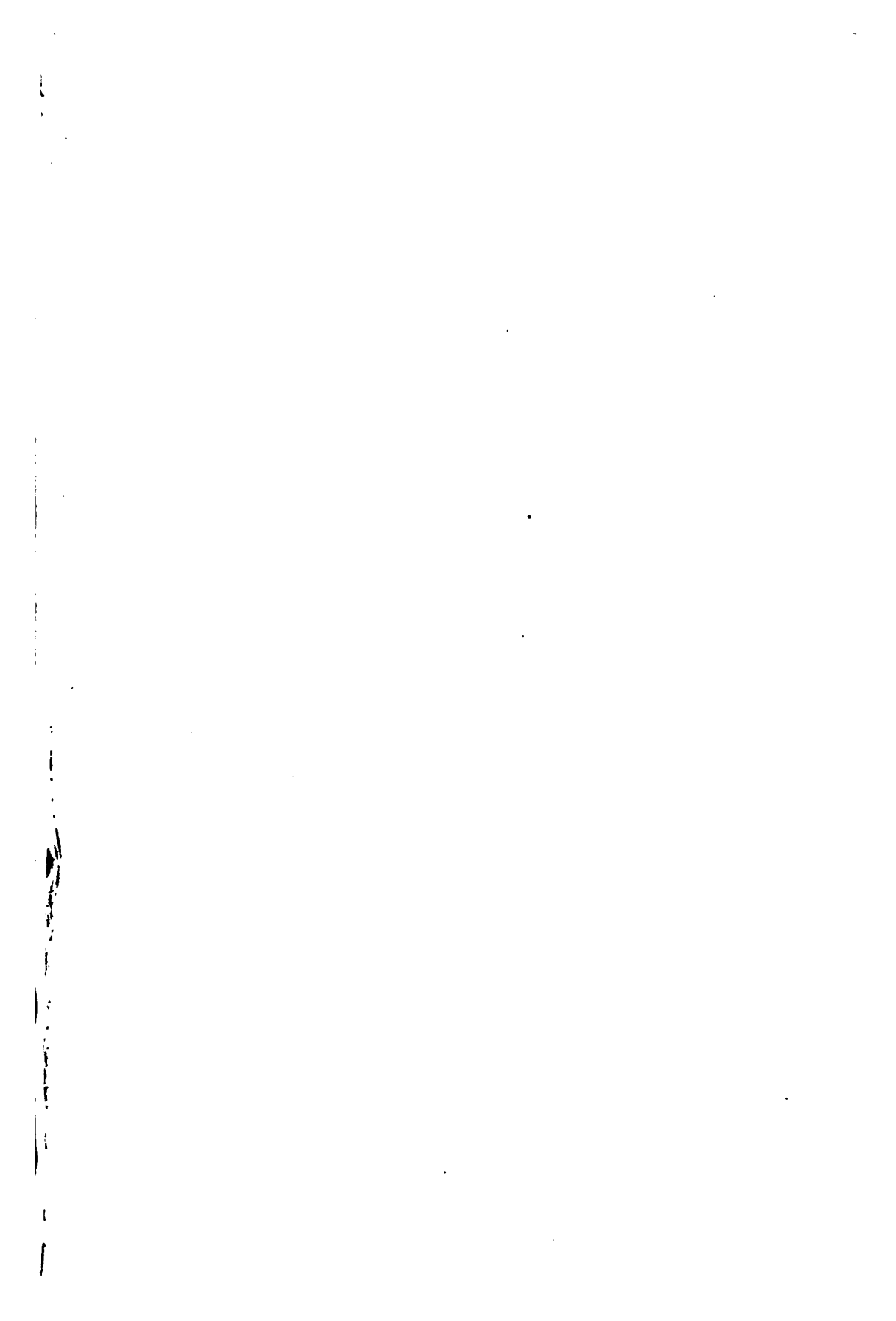
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1



Sept 17.

THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XV.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1914.

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SEP 1 1914

TABLE OF CASES.

Allen, Oberhelman v.	75	Cody v. Greene Packet Co.	529
American Carriage Co., Plasco		Colter Co., Gaither v.	555
v.	273	Columbus Ry. & Light Co.,	
Assessors, State ex rel v.	535	Davis v.	416
B. & O. S. W. Ry., Cincinnati		Columbus, Roberts v.	297
v.	219	Commissioners Hamilton	
B. & O. S. W. Ry., Hughes v.	604	County, Hahn v.	472
Bates v. Jeffrey.	435	Costanzo, Estate of	225
Beckel v. Ohio Nat'l Life Ins.		Crawley v. I., C. & E. Traction	
Co.	266	Co.	157
Binder v. Buller	394	David, Souhrada v.	257
Bingham v. State	625	Davis v. Columbus Ry. & Light	
Blacker, Harrison Co. v.	377	Co.	416
Blume v. Thompson.	97	Detterline, State v.	433
Brown v. Jeffrey Mfg. Co.	45	Devine, Cleveland & Pittsburg	
Brown, State v. 65 and	401	Ry. v.	56
Buckner, Murray v.	424	District Board of Assessors,	
Bucyrus Steel Castings Co. v.		State ex rel v.	535
Farkas	609	Dory v. Sebald	302
Buller, Binder v.	394	Elliott v. Shaw	81
Buschle v. Buschle Mfg. Co. ...	618	Estate of Todarello	593
Castle v. Mason	545	Ewing v. Ewing	73
Cedar Point Resort Co. v.		Ex Parte Wm. C. Scott	321
Nuhn	449	Faber v. Hageman	85
Cemetery of Spring Grove,		Farkas, Bucyrus Steel Cast-	
Wulftange v.	49	ings Co. v.	618
Cincinnati v. B. & O. S. W.		Finley, State v.	499
Ry.	219	Fisher, Kunkle v.	351
Cincinnati v. Fogarty.	541	Fogarty, Cincinnati v.	541
Cincinnati v. Interurban Rail-		Fosdick, State ex rel v.	337
way & Terminal Co.	40	Fosdick, State ex rel v.	630
Cincinnati v. P., C., C. & St.		Fourth National Bank, Russell	
L. Ry.	317	v.	134
Cincinnati, Rucker v.	252	Fulworth Garment Co. v. In	
Cincinnati Car Co., Snider v. ...	621	ternational Garment Work-	
Cincinnati Realty Co., Griffen		ers Union	353
v.	125	Gaither v. Colter Co.	555
Cincinnati Traction Co., Greve		Gau v. Ley	1
v.	289	Geo. H. Mellen Co., Miller v. ...	33
Citizens Trust Co., State v. ...	149	Graves, Janes v. 17 and	193
Civil Service Commission,		Green v. State Civil Service	
Green v.	385	Commission	385
Cleveland, Luttner v.	517	Greene Packet Co., Cody v. ...	529
Cleveland & Pittsburg Ry. v.			
Devine	56		

Greve v. Cincinnati Traction Co.	289	O'Dwyer, Meyer v.	129
Griffin v. Cincinnati Realty Co. 129	3	Oberhelman v. Allen	75
Hageman, Faber v.	85	Ohio Electric Ry., Weingartner v.	31
Hahn v. Commissioners Hamilton County	472	Ohio National Life Ins. Co., Beckel v.	266
Harmeyer, Postal Life Ins. Co. v.	476	P., C., C. & St. L. Ry., Cincinnati v.	317
Harrison Co. v. Blacker	377	Peck v. Peck	586
Hart v. Manahan	460	Plasco v. American Carriage Co.	273
Hirstius, State ex rel v.	505	Police v. Industrial Commission	577
Hughes v. B. & O. S. W. Ry	604	Postal Life Ins. Co. v. Harmeyer	476
Huntington, Western Educational Society v.	481		
I., C. & E. Traction Co., Crawley v.	157	Railway, Cincinnati v.	317
In re Estate of Costanzo	225	Railway v. Devine	56
In re Estate of Todarello	593	Railway, Hughes v.	604
In re Petition to Prohibit Sale of Intoxicating Liquors	367	Railway v. Wilson	513
In re Will of Joseph Reckard	465	Reckard, In re Will of	465
In re Wm. C. Scott.	321	Reinhart & Newton v. State ..	92
Industrial Commission, Police v.	577	Rhodes, State v.	117
International Garment Workers Union, Fulworth Garment Co. v.	353	Roberts v. Columbus.	297
Interurban Railway & Terminal Co., Cincinnati v.	40	Rockefeller, Koblitz Bros. Realty Co. v.	161
		Rucker v. Cincinnati	252
		Russell v. Fourth National Bank	184
Janes v. Graves.	17 and 193	Schaeffer, Schaine v.	599
Jeffrey, Bates v.	435	Schaine v. Schaeffer	599
Jeffrey Manufacturing Co., Brown v.	45	Schneller, State ex rel v.	438
Joseph v. Larkworthy	561	Scott, Wm. C., Ex Parte	321
Kletchko v. Shupp & Son	332	Scott v. Walker	208
Koblitz Bros. Realty Co. v. Rockefeller	161	Sebald, Dory v.	302
Kunkle v. Fisher	351	Shaw, Elliott v.	81
		Shupp & Son, Kletchko v.	332
Larkworthy, Joseph v.	561	Snider v. Cincinnati Car Co.	621
Lewis, State ex rel v.	582	Souhrada v. David	257
Ley, Gau v.	1	Spring Grove Cemetery, Wulf-tange v.	49
Lunkenheimer Co., Zoz v.	575	Springfield & W. Ry. v. Springfield	241
Luttner v. Cleveland	517	State, Bingham v.	625
		State v. Brown	65 and 401
Manahan, Hart v.	460	State v. Citizens Trust & Guaranty Co.	149
Mason, Castle v.	545	State v. Detterline	433
Mellen Co., Miller v.	33	State v. Finley	499
Meyer v. O'Dwyer	129	State v. Hirstius	505
Miller v. Geo. H. Mellen Co.	33	State, Reinhart & Newton v.	92
Murray v. Buckner	434	State v. Rhodes.	117
		State, Thuma v.	625
Nuhn, Cedar Point Resort Co. v.	449	State ex rel v. Fosdick	630
		State ex rel Carnes v. Fosdick	337

TABLE OF CASES.

v

State ex rel v. District Board of Assessors	535	Thuma v. State	625
State ex rel v. Lewis	582	Todarello, Estate of	593
State ex rel v. Schneller	438		
State ex rel v. Struble	233	Walker, Scott v.	208
State ex rel v. Swingle Con- tracting Co.....	279	Walker v. Walker	189
State ex rel v. Wright	305	Weingertner v. Ohio Electric Ry.	31
State Civil Service Commis- sion, Green v.	385	Western Educational Society v. Huntington	481
Struble, State ex rel v.	233	Wilson, T. & O. C. Ry. v.	513
Swingle Contracting Co., State ex rel v.	279	Wright, State ex rel v.	305
		Wulftange v. Cemetery of Spring Grove	49
T. & O. C. Ry. v. Willson	513		
Thompson, Blume v.....	97	Zoz v. Lunkenheimer Co.	575

OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XV.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

ABATEMENT OF FACTORY NOISES IN A RESIDENTIAL NEIGHBORHOOD.

Common Pleas Court of Hamilton County.

HENRY F. GAU ET AL V. HOWARD M. LEY ET AL.

Decided, August 7, 1913.

*Injunction—Lies to Prevent Disturbing Noises which Affect Property
Values—Abatement Decreed, Upon Petition of Nearby Residents,
Against Noisy Operation of a Factory Making Architectural and
Ornamental Iron.*

Where a factory is located in a residence neighborhood, after notice of strong objection thereto and efforts to prevent such location, and it is so operated as to give rise by the pounding and riveting of iron to continuous noises which interfere with conversation or the use of the telephone in the neighborhood and to produce actual physical discomfort to persons of ordinary sensibilities, and the evidence shows that by the use of improved machinery and modern methods much of the noise could be obviated, injunction will lie upon petition of property owners thus annoyed or injured for an abatement of the noise, notwithstanding a nearby railroad upon which many trains are operated contributes to the disquiet of the neighborhood.

Heilker & Heilker and Ed. F. Alexander, for plaintiff.
W. A. Hicks and F. E. Wood, contra.

GORMAN, J.

This action is one for an injunction to restrain the continuance of an alleged nuisance. Plaintiffs in their petition set out that they are acting for themselves and for others similarly situated, and say that they are and have been, for a number of years past, residents and owners of property on May street near Lincoln avenue in the city of Cincinnati, Ohio, being a high class, exclusively residential neighborhood; that May street and Lincoln avenue are improved with costly and valuable residences and have been so used exclusively for many years; that the homes on May street from Lincoln avenue south range in value up to thirty thousand dollars. They further allege that the defendants are the owners of several lots fronting on the south side of Lincoln avenue beginning at a point 150 feet east of May street, and in the year 1912 they built upon said lots a factory building within which they have been conducting and maintaining a blacksmith shop, machinery and appliances for handling, shaping and manufacturing structural, architectural and ornamental iron work, and that in the conduct of such business defendants continuously cause loud, disturbing, unusual and disagreeable noises to be made by hammering on iron, riveting iron rivets and shaping, moving and handling iron; that said noises disturb the order and peace and quiet of said neighborhood, rendering conversation and telephone communication difficult, and compelling the plaintiffs and others in the neighborhood to keep their windows closed during the day time, and rendering the premises of the plaintiffs and others in the neighborhood unfit for use and enjoyment in the ordinary manner; that said noises begin at seven o'clock in the morning and continue throughout the entire working day, thereby preventing plaintiffs' families and those in the neighborhood from enjoying sleep, rest or recreation, or enjoying the use of their premises, and affecting those who are sick in the neighborhood.

Plaintiffs further state that their premises have been greatly impaired and diminished in value, and that if the defendants are allowed to continue the production of these noises, the premises of the plaintiffs and others in the neighborhood will be ren-

1913.]

Gau v. Ley.

dered unfit for residence purposes and plaintiffs will suffer great and irreparable injury.

They therefore pray for an injunction² to restrain the defendants from carrying on their business in the manner in which it is alleged they are operating their plant and conducting their business at the present time.

The defendants have filed an answer admitting that the plaintiffs are and have been for a number of years owners and residents of property on May street near Lincoln avenue, and admitting that the defendants are the owners of the property on the south side of Lincoln avenue described in the petition, and that during the year 1912 they erected a manufacturing building thereon. They further set up that their factory also abuts on the line of the Cincinnati, Lebanon & Northern Railroad and the Norfolk & Western Railroad, and that the property on which their said building has been erected was and is not suitable for residence purposes, and that there are a number of business and manufacturing establishments along the line of said railroad and in the vicinity of defendant's building. They further aver that if there is any extreme, unusual, or disturbing noises in said neighborhood, that the same arise from the operation of said railroads, and not from the operation of defendant's business. They further aver that they are conducting in said building a plant for the fabrication of structural and ornamental iron; that the appliances and machinery used in such plant are the most modern and approved type and that any noise arising therefrom is not sufficient to disturb the peace and quiet of plaintiffs' homes. They deny each and every other allegation of the plaintiffs' petition.

The plaintiffs filed a reply to the answer of the defendants denying all the material allegations of the new matter therein set up.

The case came on to be heard before the court upon these pleadings and the evidence. There were thirty-four witnesses called by the parties, who testified as to the character, intensity and volume of the noises emanating from the defendants' plant. It would be neither profitable nor practicable to undertake to dissect and analyze the testimony of the witnesses and other

evidence in the case, consisting of plats and exhibits. The court will endeavor to state briefly the conclusions of fact and law in the case. The evidence discloses that in 1911, or the early part of 1912, the defendants in the case purchased a strip of property lying south of Lincoln avenue and east of May street, abutting upon the Cincinnati, Lebanon & Northern Railroad and about 150 feet eastwardly from May street. This property is situated probably 15 or 20 feet above the level of the railroad tracks, which tracks at this point are in a deep declension or ditch just north of the exit from the tunnel near Oak street. Their building fronts on Lincoln avenue on the south and extends southwardly a distance of perhaps 200 feet. It is a one-story building with a pressed brick front and concrete walls in the rear, with large windows which may readily be opened on the east, west and south sides; with a large double door opening on the south end of the building. These windows can be and are kept opened during the summer months and at other times when desirable. There is considerable machinery in the building, including a twenty-five horse power gasoline engine which furnishes the power for the plant. There is a driveway on the west side of defendants' plant leading from Lincoln avenue southwardly and around to the rear of the building and quite a large yard space on the south and east sides of the building.

Across the railroad from this plant and on a level with the railroad tracks is a coal tipple, but this coal tipple is seven or eight hundred feet away from the nearest residence on May street or Lincoln avenue. Two squares north of Lincoln avenue, on Shillito street, is the lumber yard of the Enterprise Lumber Company, which operates a circular saw at times, but which makes very little noise and can not be heard ordinarily at the corner of Lincoln avenue and May street. The Banner Baking Powder Company has a plant on Stanton avenue about 1000 feet away from May street, but scarcely any noise whatsoever emanates from this plant. Some noise is made by the coal tipples when coal is unloaded from the cars into the hoppers, and wagons are loaded from the hoppers, but this noise from the coal tipple is not very intense and is scarcely heard on May street.

1913.]

Gau v. Ley.

A great many railroad trains pass up and down on the double tracks of the Cincinnati, Lebanon & Northern Railroad Company with the usual puffing of the engine, rumbling of the trains, ringing of bells and blowing of whistles. These trains have been operated over these tracks for more than thirty years. There is no other manufacturing plant in the neighborhood of the plaintiff's property or within many blocks of it, excepting those above mentioned.

When the defendants were about to erect their plant, several of the residents on May street and Lincoln avenue sought to prevent it being done, and endeavored to purchase from the defendants the property so as to prevent the erection of this plant, but they were unable either to prevent the plant being erected or to purchase the property from the defendants. The defendants deliberately went into this neighborhood and erected their plant with the knowledge of the opposition which they would meet from the residents of that neighborhood. The residences on Lincoln avenue from the Reading road to the bridge are handsome, costly and beautiful homes, and those on May street are perhaps even more beautiful and costly. These residences have been occupied by the owners for many years with their families, in peace and quiet, with no noises except that from the moving of the trains in the rear of their property and slight noises that emanated from the coal tipple.

The evidence shows that from the time the defendants completed their building and occupied the same as a manufacturing plant, they have from time to time brought large quantities of iron girders, eyebeams, angle irons, plates and other kinds of structural and architectural iron into their premises, unloaded the same from wagons and cars in their yards and in their plant, which unloading was accompanied by great and disagreeable noises of clanging iron. They have also broken up in their yard and in their plant large quantities of second-hand iron by means of sledge hammers and chisels and other instruments, thereby causing intense, disagreeable and loud noises, which could be heard as far as 1,000 to 1,500 feet away from defendants' plant. They have also been hot riveting and cold riveting in the plant, and in some instances out in the yard, by means of

sledge hammers and small hammers. They have also been accustomed to "peening" out metal plates varying from one-half to three-quarters of an inch in length, which "peening" process consists in laying the metal plates upon a metal or iron table and using the curved small end or peen of the hammer to straighten out or smooth out buckled or creased plates, and the noise accompanying this operation is intense and disagreeable, and as some of the witnesses said, "pandemonium" itself.

These noises caused by these various operations of the plant and the various workings therein have been practically continuous during the day time from the time this plant was erected and in operation. The evidence further shows that the straightening of plates, smoothing them out, may be done by machinery without hammering them out, as is done in this plant. The defendants testified that the cost of a machine to do this work would not be more than \$500 or \$600.

The evidence further shows that there is no occasion for hot riveting with sledge hammers or other hammers, but that this may also be done by modern improved and approved machinery. There was evidence also tending to show that the cold riveting of plates may be done by machinery and need not be done by hammering. There was also evidence tending to show that the breaking up of structural iron may be avoided and that it is unnecessary to separate parts of iron by means of chisels and sledge hammers, but that separation may be done by sawing through the metal. In short, the testimony shows that practically all of the noises complained of by the petitioners can be avoided by the use of modern improved machinery, and that without very great cost or expense to the defendants.

The evidence shows that plaintiffs and many others living in the neighborhood, who have come before the court and testified, are unable to enjoy the use of their premises in the summer time, especially on their porches and in their yards, by reason of the continuous, loud and disagreeable noises caused by the clashing of metals in the defendants' plant. Members of the plaintiffs' families and others in the neighborhood who are sick and indisposed, have been rendered nervous and irritable, and

1913.]

Gau v. Ley.

the members of the family have become solicitous about their nervous condition and their state of health.

Under this state of facts the question is, whether or not a court of equity has power to restrain the defendants from making the noises complained of, or if necessary to restrain entirely the operation of their plant which produces these noises.

Wood on Nuisances, Vol. 2, 3d Ed., Section 611, lays down the rule that:

“It is now well settled that noise alone, unaccompanied with smoke, noxious vapors or noisome smells, may create a nuisance and be the subject of an action at law for damages, in equity for an injunction, or of an indictment as a public offense.” Citing the case of *Crump v. Lambert*, L. R., 3 Eq. Cas., 409, and many other authorities.

The Superior Court of Cincinnati in General Term, in the case of *Shaw v. Queen City Forging Company*, and *Mears v. Queen City Forging Company*, 7 N. P., 254, held that the creation of noises by a plant operating a trip hammer was such a nuisance as a court of equity would enjoin upon the petition of the resident property owners in the neighborhood. Judge Dempsey, who announced the opinion of the General Term, went quite fully into the law of the case, and cited many authorities applicable to that case, which is similar to the case at bar.

In the case of *Dittman v. Repp*, 50 Md., 517, it was held that:

“Noise alone, if it be of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance and be the subject of an action at law or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city.”

Many other decisions of like nature might be cited.

In the case at bar the court is of the opinion that the noises emanating from the defendants' plant are of such a character as to produce actual physical discomfort and annoyance to persons of ordinary sensibility living in the neighborhood of the defendants' plant.

One of the first recorded cases which we have on the question of restraining the continuance of a nuisance is that of *Morley*

v. *Pragnel*, a decision of the King's Bench rendered in 1638, reported Cro. Car., 510, in which case the court laid down this rule: that every one ought to so use his own as not to injure others or the rights of others. And the latin maxim, "*sic utere tuo, quod alienum non laedos*" was followed in that case. That was a case in which the defendant directed and carried on a tallow-furnace, the stench from which annoyed the plaintiff, and the continuance of that nuisance was found to be an indictable offense and adjudged to be removed.

The case of *Bliss v. Hall*, 4 Bing. (N. C.), 183, was an action to recover damages for a nuisance claimed to have been maintained by the defendant in carrying on the candlemaking business, which produced noxious vapors and smells and which annoyed the plaintiff and affected him and his property. In that case Justice Vaughan, in speaking of the right by prescription to continue the business and the production of noxious smells, said:

"The smells and noises of which the plaintiff complains are not hallowed by prescription, and under this plea the defendants can not justify their continuance."

And Justice Bosanquet said:

"I am of the same opinion. The defendant has, *prima facie*, a right to enjoy his property in a way not injurious to his neighbor; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance."

In the case of *Bamford v. Turnley*, Exchequer Chamber, reported 3 B. & S., page 62, a judgment was upheld in the case in which plaintiff brought an action to recover damages from the defendant for carrying on a brick-yard or brick kiln in the neighborhood of the plaintiff's property, causing noxious and unwholesome vapors, smoke and fumes to arise from the brick kiln to enter in and spread themselves upon and over plaintiff's property. The case was very fully considered by the Court of Appeals, and many of the justices put down their opinions, citing numerous cases to establish the rule above stated, "*sic utere tuo*," etc.

In the famous case of *St. Helen's Smelting Company v. Tipping*, decided by the House of Lords, 1865, reported 11 H. L. C.,

1913.]

Gau v. Ley.

642, the defendant operated and carried on a copper-smelting business near the residence of the plaintiff, causing large quantities of noxious gases and vapors to emanate therefrom to the injury of the plaintiff's property, his herbage and trees and shrubs, and to the detriment of the health of his cattle and the deprivation of the plaintiff to the beneficial use of his premises. The action was one for damages and it was held by the Lords upon the appeal and final hearing, that the verdict and judgment in favor of the plaintiff for damages was proper. In discussing the case the Lord Chancellor, among other things, says:

"In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance on the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. * * * If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration."

And again he says:

"And the only ground upon which Your Lordships are asked to set aside that verdict and to direct a new trial, is this, that the whole neighborhood where these copper-smelting works are carried on, is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper-smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be utter destruction, or the very considerable diminution, to the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word

'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably can not carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property."

The court is of the opinion that this statement of the Lord Chancellor effectually disposes of the claim of the defendants in this case, that because their plant is located in the neighborhood of a railroad and where some other manufacturing plants are located, that therefore the plaintiffs have no remedy against them on account of any noises which may be produced in the defendant's plant.

In the case of *Sturges v. Bridgman*, decided by the Court of Appeals in Chancery, 11 Ch. Div., 852 (1879), the plaintiff was a physician, who occupied a house on Wimpole street, London, with a garden behind the house. In this garden the physician erected a consulting-room. The defendant was a confectioner in large business, whose kitchen backed up against the consulting-room of the physician in the plaintiff's garden. So there was nothing between plaintiff's consulting-room and defendant's kitchen but the party-wall. The defendant in his kitchen had two large marble mortars set in brick-work, built up against the party-wall, and were worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall, and were used for breaking up and pounding loaf-sugar and other hard substances and for pounding meat. The plaintiff alleged that when the defendant's pestles and mortars were being used, the noise and vibration thereby caused were very great and were heard and felt in the plaintiff's consulting-room, and that such noise and vibration seriously annoyed and disturbed the plaintiff and materially interfered with him in the practice of his profession. In particular the plaintiff complained that the noise interfered with his examining his patients for auscultation for diseases of the chest. He also found it impossible to engage in any occupation which required thought and attention. The defendant set up as a defense that he and his father had used one of the pestles and motars in the same place and to the same extent as now, for more than sixty years, and

1913.]

Gau v. Ley.

he alleged that if the plaintiff had built his consulting-room with a separate wall and not against the defendant's kitchen, he would not have experienced any noise or vibration. It was shown that the plaintiff, the physician, built his consulting-room a short time before the bringing of the action, and more than fifty years after the defendants had maintained their mortars and pestles in practically the same situation and operated in practically the same way. Sir George Jessel issued an injunction restraining the defendant from operating his mortar and pestle to the annoyance of the plaintiff. This judgment was on appeal affirmed by the Court of Appeals, and in this case the court took occasion to say that the length of time that an objectionable business had been carried on would give no right to the defendant to carry it on in an objectionable manner.

In the case of *Crump v. Lambert, supra*, Lord Romilly said:

"With respect to the question of law, I concede it to be established by numerous decisions * * * that noise alone * * * although not injurious to health, may severally constitute a nuisance to the owner of neighboring or adjoining property. That if they do so, substantial damages may be recovered at law, and that this court [Court of Chancery], if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law."

A great number of cases will be found cited in *Wood on Nuisances*, Chap. 18, Sections 611 to 644 inclusive, 3d Ed., to which counsel are referred. See also, Chap. 10, Sections 174 to 191 inclusive, of *Joyce on Nuisances*, wherein numerous authorities are cited holding that noises unaccompanied by vibrations, smoke or vapors, may be enjoined when they materially interfere with the comfort and enjoyment of residence property and substantially affect their enjoyment by persons of ordinary sensibilities.

In the case of *Davis v. Sawyer*, 133 Mass., 289, it was held that the habitual ringing of a bell may constitute a nuisance and may be enjoined, as in the case of a heavy factory bell which was rung at an early hour in the morning to rouse the operatives, and which disturbed the sleep of residents in the neighborhood.

It was held in the case of *Harrison v. St. Marks Church*, 12 Philadelphia, 259 (a famous case), that where the ringing of church bells causes a substantial annoyance and injury to oc-

cupants of adjoining premises it may be enjoined. Here it would seem that not even a house of worship may with impunity produce annoying noises by the ringing of bells even for the purpose of assembling the worshippers.

The blowing of steam whistles in factories may be enjoined, as was held in *Redd v. Edna Cotton Mills*, 136 N. C., 342. The only limitation which the Court of Chancery appears to have placed upon its power is that the noises shall be such as will substantially and materially affect the peace, quiet and comfort of persons of ordinary sensibility.

In *Clerk and Lindsell on Torts*, page 388, second paragraph, it is laid down as a rule that:

“Acts which are productive of mere personal discomfort may amount to an actionable nuisance, as, for instance, where the defendant creates stench by the carrying on of an offensive manufacture or otherwise * * * or makes unreasonable noises upon his land or impairs the amenity of a neighborhood by vibration and noises, even though the nuisance be of a temporary character. * * * ”

And in this volume pages 388 to 394 inclusive will be found citations of many cases in which the courts hold that noises which annoy and affect the comfort of persons of ordinary sensibility may be enjoined.

A very strong case is that of the *Appeal of Ladies' Decorative Art Club of Philadelphia*, 13 Atl. Rep., 537, where the court enjoined the pounding and hammering of brass in a residence neighborhood upon the ground that it tended to materially affect the comfort and enjoyment of the plaintiff's home. In that case the former owner of the plaintiff's property testified that he suffered no inconvenience from the noise. Other persons testified, as in the case at bar, that they were not annoyed by the noise emanating from the premises of the Decorative Art Club. In commenting on the testimony of the former owner of the plaintiff's property in the case just cited, the court says:

“It is true that Mr. Brush, who sold the plaintiff the house in which he lives, says in a brief affidavit that he was not seriously annoyed by the noise complained of while he resided there. Perhaps that is the reason why he was silent about the noise

1913.]

Gau v. Ley.

when he sold to the plaintiff. It is certain that he did not mention these noises to the plaintiff before he sold his house to him and the witness may possibly be so constituted as not to be easily troubled by noises of any kind."

The court thinks that this language is applicable to the testimony of one of the witnesses called on behalf of the defendants, John C. Alander, who testified that he could sleep in a boiler factory while the same was in operation without any discomfort or annoyance to him.

In the case just cited the court further says:

"Mr. Heller, who teaches the languages for a certain time every day in the front parlor of the house occupied by the defendants, also says that he has not been troubled by the noises complained of. But Mr. Heller might be of quite a different opinion, perhaps, if he dwelt with a family in the house occupied by the plaintiff."

And so it may be said in this case, that many of the witnesses who live on Oregon street and Stanton avenue, east and north of the defendants' factory, might not be so willing to endure the noises emanating from the defendants' plant if they resided on May street or Lincoln avenue in the neighborhood of the premises belonging to the plaintiffs.

In the case of *Froelicher v. Oswald Ironworks*, 111 La. Rep., 706, it was held that:

"Acts which disturb physical comfort to an injurious extent, may be restrained by interposition of the courts;" and

"An offensive occupation can not be carried on to the very great annoyance of the one dwelling immediately near.

"No one has the right to use his own land so as to render that about him in any degree useless. His enjoyments must have reference to the rights of others."

In this case the court enjoined the defendant from operating its blacksmith-shop in such a manner as to produce noises which materially affected the enjoyment of the plaintiff's property.

In the case of *McMorran v. Fitzgerald*, 106 Mich., 649, an injunction was issued to restrain the operation of a machine shop devoted to boat repairing, situated in a neighborhood otherwise given up to costly residences, and erected in the face of

protests, after the character of the locality as a residence district had been established.

The court is of the opinion that the facts in the case just cited and the law applied thereto, may well be cited as applying with great force to the facts in the case at bar.

On page 652 of this report, the learned judge who announced the opinion of the court, says:

"But when one invades a suburban district with an offensive and noisy business, which from its nature is injurious to those having homes in the vicinity, simply because he can purchase the land cheap, or because the location has peculiar advantages for his purpose, he takes the risk of being compelled to compensate the injured neighbors, or perhaps desist from the offensive use of the property."

And again on page 653 the court says:

"As stated before, the situation was apparent but the defendants purchased the premises for the purpose of erecting their shop, and before its erection they were cautioned, and were offered a large sum to abandon the project; but they insisted. Further earnest of the complainants sincerity was given by the commencement of a suit to restrain the operation of this plant. But the defendants persisted, and could look at the matter only from the standpoint of business, to which all other interests should yield—a sentiment which is not uncommon, but one which the law does not sanction."

Many other cases might be cited by the court in support of the claim of the plaintiffs that an injunction should issue in this case to restrain the carrying on of the defendants' business to the annoyance of the plaintiffs and those in the neighborhood of the defendants' plant. But the court is of the opinion that the cases cited are sufficient to sustain the contention of the plaintiffs.

Counsel for the defendants have cited the case of *Goodall v. Crofton*, 33 Ohio St., 271, and the case of *Grothlich v. Klein et al*, 13 C.C.(N.S.), 335, in support of their contention that no injunction should be issued in this case unless the right to the same has been clearly established, and that the noises from

1913.]

Gau v. Ley.

the plant of the defendants are not, under the circumstances, such as constitute a nuisance under the law.

As to the case of *Goodall v. Crofton*, *supra*, it was pointed out by the Superior Court in General Term, in *Shaw v. Forging Company*, *supra*, that the facts in that case were, that a landlord whose property was rented to tenants for income producing purposes, was being injured in its rental value by the operation of the defendants steam engine and machinery in an adjoining marble yard, leaving no doubt in the minds of the court but that the injury sustained by reason of the alleged nuisance in that case could be compensated for in an action for damages. That rule would not apply to a case where the plaintiff was occupying his premises as a residence and not renting it out to others for revenue purposes, because in the latter case, as the court very properly said in 33 Ohio St., 271, adequate damages for the diminished value of the property could be recovered in an action at law.

In the case of *Grothlich v. Klein*, *supra*, the facts stated by the court are so meager that we doubt very much if the case may be held to be an authority in point. Judge Giffen, in stating the facts, says:

"It appears from the testimony and a view of the premises, including the power-shears in operation, that the chief noise arises from the cog-wheels forming a part of the gearing, and that there is no substantial vibration affecting plaintiff's property. * * * The business itself is lawful and conducted in an ordinary prudent manner. Such annoyance as the plaintiff suffers is no greater than is endured in any populous neighborhood devoted, as this is, in part to manufactures, and to grant the relief by injunction would practically suspend manufacturing within the city limits."

And again he says:

"There is and can be no real injury to the property itself, and while the annoyance to the plaintiff and her tenants is substantial, it does not amount to a nuisance for which an injunction should be granted."

It would appear therefore, from the statement of the learned court in this case, that no substantial annoyance was suffered

by the plaintiff on account of noises emanating from the defendant's plant.

In the case at bar the court heard the testimony during several days of numerous witnesses. The court also visited the plant upon one occasion with counsel, and saw it in operation. Upon another occasion, he was in the neighborhood of the plant, though not inside. And from his observation, as well as from the evidence in the case, he has no hesitancy in saying that the noises emanating from the defendant's plant constitute an intolerable nuisance to the people who reside in the neighborhood.

He is also of the opinion that most of these noises may be easily avoided by operating the plant in accordance with modern methods and modern machinery.

In conclusion, the court is of the opinion that the prayer of the petitioners should be granted to this extent: the defendants should be enjoined from peening out their plates by hammers; they should be enjoined from breaking up with sledge hammers or other appliances old or new iron in their yard, or in their plant; they should be enjoined from cold chiseling eyebeams, girder and plates, or any other metal substances which can be separated by sawing or clipping by machinery; they should be enjoined from hot riveting by means of sledge hammers or other hammers; they should be required to do their hot riveting by machinery which produces no noise; they should be enjoined from cold riveting their plates by means of small hammers; and they should be required to do this riveting by means of compressors or the squeezing process, which the evidence shows can be practicably done by modern improved machinery.

If this plant can not be operated without producing noises which substantially affect the peace and comfort of the plaintiffs and those in the neighborhood of the plaintiff, then the entire operation of the plant should be enjoined.

The court will allow the defendants a period of sixty days from this date to arrange its business affairs so that its plant may be operated in accordance with the findings of the court. An injunction will be issued in accordance with the conclusions reached.

1913.]

Jane v. Graves.

MOTOR VEHICLE LICENSE LAW INVALID.

Common Pleas Court of Franklin County.

CHARLES C. JANES AND THE OHIO STATE AUTOMOBILE ASSOCIATION V. CHARLES H. GRAVES, SECRETARY OF STATE.

Decided, November 11, 1913.

Constitutional Law—Act Providing for Registration of Motor Vehicles Invalid—Discriminatory Provisions—Repair of Public Highways Otherwise Provided for by General Law—Purpose of the Act One of Taxation.

1. The act providing for registration of motor vehicles (103 O. L., 763) is discriminatory in its application, embodies double taxation, betrays an evident purpose to raise a fund for road and general state revenue purposes under the guise of regulation, and is invalid because not within the power of the Legislature, and because it expressly violates Article XII, Section 2.
2. One purpose of the law is a police regulation for the welfare and safety of the people. It is a registration law, not a license, being a mere regulation of an admitted right. The primary purpose of the law is overshadowed by a clear intent to impose a tax and to raise revenue.

H. L. Gordon and C. D. Saviers, for plaintiffs.

Timothy S. Hogan, Attorney-General, contra.

KINKEAD, J.

This case is submitted by plaintiffs for a temporary restraining order to prevent the defendant as Secretary of State from collecting any tax, license or fee under the provision of law relating to registration of motor vehicles, 103 O. L., 763.

Defendant meets the application by demurrer to the petition challenging the sufficiency thereof.

Plaintiffs contend that the law is unconstitutional on a number of grounds and therefore the assessment of the "registration fee" therein provided is unwarranted. Petitioners ask that the Secretary of State be enjoined from entering into contracts for the manufacture of number plates, placards, printing of blanks, books, etc.

It is contended that the law provides for a levy of a tax, and not a license; that the number of motor vehicles or automobiles

in Ohio on November 15, 1912, was 62,956, and that the owners were required to pay \$336,492.95; that the total cost of operating and maintaining the department for the year was \$60,337.85, leaving a surplus of \$276,155.10, and that under the present law it is proposed to collect an amount largely in excess of this sum. From January, 1913, to October 1, there was issued 84,500 certificates of registration for which there was collected the sum of \$425,426, at a total expense of not to exceed \$80,000, and it is alleged that under the new law for the year 1914 there will be collected a surplus amounting to more than a million dollars.

It is averred that a charge of one dollar for each motor or other license is fair and reasonable and sufficient to cover all cost of registration, and that the taking of more than that amount is taking property without due process of law.

An analysis of the law is essential to show its purpose, object, and the construction and meaning thereof.

Owners of a "motor vehicle" are required "annually" before the first day of January, to file an "application for registration" which shall contain a "brief description of the motor vehicle to be registered," the name of the manufacturer, the factory number, the number, the amount of the motive power, stated in figures or horse power, in accordance with the rating established by the association of licensed automobile manufacturers, and the name, residence and address of the owner of such motor vehicle.

The fee is \$5 for each electric motor vehicle; \$5 for each gasoline or steam motor vehicle having motive power of twenty horse power or less; \$6 for each gasoline or steam motor vehicle having a motive power of more than twenty horse power and not more than thirty horse power; \$9 for each gasoline or steam motor vehicle having a motive power more than thirty and not more than forty horse power; \$12 for each gasoline or steam motor vehicle having a motive power of more than thirty and not more than fifty horse power; \$15 for one having a motive power of more than fifty horse power, and not more than sixty horse power, and \$18 for one having motive power of more than sixty horse power.

1913.]

Jane v. Graves.

A full and correct list of registered motor vehicles and their owners is required to be furnished monthly to the clerk of each county in the state, which are to be kept as public records.

A distinctive number as an identification mark consisting of a placard containing the number of the motor vehicle is to be placed thereon.

Special provision is made for registration for manufacturers and dealers, and of chauffeurs.

The law provides:

“The revenues derived by registration fees provided for in this chapter shall be applied by the Secretary of State toward defraying the expenses incident to carrying out and enforcing the provisions of this chapter, and any surplus thereof shall be paid by him monthly into the state treasury. One-third of the revenues paid into the state treasury shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state under the direction, supervision and control of the state highway department.”

Penalties are provided for failure to comply with the regulations of the law as to tags, and other matters.

A penalty is prescribed for driving a motor vehicle without providing it with sufficient brakes to control it at all times, and a suitable bell or other device for signalling, or for failing to display a red light and three white lights.

The law provides that one-third of the revenues shall be used in the repair, maintenance, protection, policing and patrolling of the public roads and highways under the supervision of the state highway department, leaving two-thirds thereof to be used by the state as part of the general revenue.

If there is a surplus of \$1,000,000 after the Secretary of State defrays the expenses incident to carrying out and enforcing the provisions of the law, that would produce \$333,333.33 for the use of the state highway department, while \$666,666.66 would go into the general revenue fund for general state purposes.

An act passed April 8, 1913 (103 O. L., 155), provides for a levy of a tax of one-half of one mill on all the taxable property within the state, to be collected as other taxes due the state, the proceeds of which shall constitute the state highway improvement fund. Seventy-five per cent. of such fund is to be used for construction, improvement, maintenance and repair of an inter-

county system of highways and twenty-five per cent. for certain main-market roads.

The state highway department is created for "the purpose of affording instruction, assistance, and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state" (Code, Sec. 1178 *et seq.*). The state highway department act was amended 103 O. L., 449.

The state highway commissioner has "general supervision of the construction, improvement, maintenance and repair of all highways, bridges and culverts which are constructed, improved, maintained or repaired with or by the aid of state money" (Section 1183, 103 O. L., 450). He aids county commissioners and approves the design, construction, maintenance and repair of bridges and culverts, prepares plans, specifications, etc. He, with his deputies, shall designate by name and number the main roads, known as "inter-county highways." He receives application for state aid. Many other duties are imposed upon him, but nowhere is there any specific provision made for "protection, policing and patrolling of the public roads and highways" as provided in the act in question, and for which, together for "repair and maintenance" one-third of the revenues paid into the state treasury by owners of motor vehicles is to be used.

Furthermore, Section 1222-1 of the state highway act (103 O. L., 485), provides:

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the county, the county commissioners are authorized to levy a tax not exceeding one mill upon all taxable property of the county, which is in addition to all other levies authorized by law."

A levy is authorized to be made to provide a fund to pay the share to be borne by the township.

The share to be paid by the state to carry out the provisions of the state highways act are appropriated for that purpose by the Legislature from the general revenue fund. Sections 1222, 1225.

By an act passed April 16, 1913 (103 O. L., 863), there shall be levied annually a tax of one-half of one mill on all the taxable property within the state, to be collected as other taxes due the state, and the proceeds of which shall constitute the state highway improvement fund.

1913.]

Jane v. Graves.

We find here then full and complete provision for a state levy to provide all the funds necessary to pay costs and expenses of the state highway department, as well as the share of the state in construction, maintenance and repair of roads in pursuance of its provisions.

By the provisions of the act under consideration there is to be paid into the state treasury to be used for the "repair, maintenance, protection, policing and patrolling of the public highways under the direction, supervision and control of the state highway department" for the year 1914 from the "revenue" derived from fees paid by automobile owners, probably \$333,333.33 being one-third the amount paid.

As no provision is made by law for the actual "policing and patrolling of the public highways," and as there is probably no necessity therefor, the conclusion is imperative that the purpose of the law is to thus provide a fund for the "repair" and "maintenance" of the public highways, which is in addition to that already provided by law, viz., by Section 6859-1, General Code (103 O. L., 863), which provides for a specific state levy to constitute the state highway improvement fund for the express purpose of paying the state's share of improving roads under the state highway improvement law.

This discussion of the road improvement laws is for the purpose of shedding light on the meaning and intent of the motor vehicle registration law. It clearly shows how the motor vehicle law which raises so large a surplus, discriminates the class of persons owning the same, constituting the law double taxation.

Full and adequate provision has been made for the levy of state, county and township tax and assessment for the construction, maintenance and repair of roads, state, county and township.

The primary purpose of the motor vehicle law is to provide a system of state registration of motor vehicles by the owners thereof for the benefit and protection of the citizens of the state, counties, townships, villages and cities. The design is to enable those who may be injured by the negligence of drivers of such vehicles to be able to place the responsibility upon the proper persons. It is to facilitate the police regulation concerning such vehicles within villages and cities. There would be some sense in distributing a surplus to the corporate bodies whose function

is to enforce the police regulation. Even then it should not be more than is necessary.

Laws and ordinances have been passed regulating the speed which could not well be enforced without a system of registration such as we have.

The enforcement of the police regulation of the law is left to the local authority. If an owner of such vehicle fails to register, or fails to have the number and registration mark furnished by the Secretary of State displayed as required, he may be fined by the police court not more than \$50. So if he fails to have suitable brakes, bell or device for signalling, or fails to have the required lights displayed, he may be fined by the police court not more than \$25.

The only service rendered by the Secretary of State in the matter of the police regulation as to registration is the receipt of the application, the issuance of the tax or placard, the keeping of a book or index of the names of the persons so registered, and furnishing the same monthly to the county clerks.

The primary purpose and design of the enactment is police regulation, and if sustained, it must be sustained as a pure and simple regulation. And the question arises whether any of its provisions are such as to make it something more than a police regulation.

It is contended that the fees now exacted converts it into a revenue measure. It is argued that because for the year ending November 15, 1912, owners of motor vehicles were required to pay \$336,492.95, while the total cost of operating and maintaining the department for the year was but \$60,337.85, thus creating a surplus of \$276,155.10, and because under the increased fees the net surplus will be in the neighborhood of \$1,000,000, the act passes the point of mere regulation, and is converted into a revenue measure.

On this point the present law should be compared with the former law. The original law is found in the General Code, at Sections 6290-6310. Under that law, Section 6294, a registration fee of \$5 was required of an owner of each gasoline or steam motor vehicle, and a fee of \$3 for each electric vehicle.

The revenues, by Section 6309, were to be used in defraying the expenses incident to carrying out and enforcing the law, the remainder being paid into the treasury. "All such moneys com-

1913.]

Jane v. Graves.

ing into the state treasury shall be a separate fund for the improvement, maintenance and repair of the public roads and highways of this state, and be apportioned as the state highway fund is apportioned." This act was passed 99 O. L., 538.

The term "motor vehicle" as used in the act, includes all vehicles propelled by power other than muscular power, except motor bicycles, motorcycles, road rollers, traction engines, ambulances, etc. Section 6290, 103 O. L., 763.

When Section 6294 was passed fixing the fees of \$5, \$6, \$9, \$12, \$15, \$18, according to the horse power of the motor vehicle, and Section 6309, providing that the "revenues" derived by registration fees, one-third thereof should be used for the repair and maintenance of the roads, were amended April 28th, 1913, it is to be presumed that the Legislature had in mind the amount of revenue which had been derived under former Section 6294, where the fee was \$5 without distinction as to horse power.

No one can reasonably contend that the cost of registration of a motor vehicle with a horse power of more than sixty is greater than that of one of twenty horse power or less.

There can be no other rational presumption than that the purpose of the increased fee, and the change giving the state highway improvement fund but one-third of the revenues paid into the state treasury, was to add two-thirds of such surplus to the general revenue fund of the state.

The plain purpose of the amended act, in the light of knowledge of the large surplus which came into the hands of the state highway fund, was to increase the general revenue of the state to the extent of the two-thirds of such surplus.

Courts still approach questions of validity of legislative enactments in the spirit of the framers of the organic law, who clearly intended that the judicial power was to be used to declare the law, whether it be a question of common law, of statutory or constitutional law. The duty is to be performed without a quaking fear of criticism of those reviving the school of thought which was maintained by some a hundred and more years ago, when it was sought to impeach judges for declaring laws unconstitutional. The fact that a constitutional amendment places a limitation upon the power of the court of last resort to invalidate law may only serve as a reminder to inferior courts of the fundamental principle that laws are not to be declared unconstitu-

tional unless clearly so; that if two constructions are possible, one of which will validate the law while the other will invalidate it, that construction will be adopted which will sustain the law. But this principle must not be pressed so far as to amount to an abdication of the functions of the court to declare the law.

The supreme law of the land is the Constitution made by the voice of the people. It declares the powers of and limitations upon the legislative power, as well as that of the judiciary.

When the Legislature passes a law which is beyond its power because it clearly and distinctly conflicts with a specific provision of the supreme law of government as embodied in the written Constitution, the supreme law must stand and be maintained, while the pretended law passed by the legislative agents of the people must fall. The power of the agents can not rise higher than that of the people. The courts who are empowered to declare the law must merely declare and enforce the supreme will of the people. If they did not, who would, and what would happen? This power is expressly delegated, not assumed. If the Legislature were permitted to act without regard to constitutional limitation, the voice of the people would not be supreme. And if it were within the exclusive province of the Legislature to say when it acted within its power under the Constitution, it would be to accord to itself judicial power, which is in fact exclusively conferred upon the judiciary, and would make legislative enactment superior to constitutional law.

In passing the law in question has the Legislature acted within or beyond its power?

The exclusive power to assess a tax, a license tax, or to provide for a license is vested in the Legislature. The power to tax to provide for the raising of a revenue is not expressly conferred by written Constitution, but is inherent in the government and is exclusively vested in the legislative branch of government by common law. The same is true of the right to impose and exact a license tax. The same is true of the right to provide for the grant of a license. But the purpose and source of the power to impose a license tax or to exact a license is wholly different from the power to tax.

The inherent power to tax is to be exclusively exercised for the express and sole purpose of raising revenue to defray the expenses of government. In pursuance of this power the Legisla-

1913.]

Jane v. Graves.

ture may provide in addition to the imposition of a tax for governmental expense, the levy of assessments for the making of internal public improvements imposing such assessments upon landowners specially benefited thereby.

Both the power to tax and to levy an assessment has been exercised for the construction, maintenance and repair of public roads. The statutes of the state already provide for the tax to be levied which is to be borne by the people in general as their share of the improvements, while the special assessment is levied upon adjacent property owners according to special benefits.

Under the new scheme contemplated by the state highway department by Section 6859-1 (103 O. L., 863), all the people of the state contribute their proportionate share to the tax of one-half of one mill on all taxable property.

Section 5635 provides for the levy by the county commissioners for taxes for county road and bridge purposes, and Section 7499 provides for special levy on lands for certain distance on each side of a road, for road purposes.

The only way by which a fund can be raised for road purposes is by a uniform method of tax upon the taxable property of the state. A revenue for the purpose of maintenance and repair of public roads can not be otherwise made than by the levy of tax; it can not be done under the guise or form of a regulation fee imposed upon a certain or particular class of users of public roads on the theory that such class use the road in a more burdensome manner. In the winter season there is one class of vehicles which no doubt exclusively use the roads, while the motor vehicles use them to great extend at the warmer seasons. This act imposes a fee which for one year produced \$336,492.95 and \$276,155.10 was paid into the state treasury to be spent on the roads. The amended act it is claimed will produce a surplus over the operating expenses of the department of \$1,000,000, one-third of which is to be spent on the roads, while two-thirds is to be used for the general expenses of the state government. All other vehicle owners are to pay nothing beyond their ordinary taxes.

Does not the bare statement of the facts plainly and unequivocally demonstrate that the fees exacted have passed the boundaries of mere regulation into the field of taxation. The

fee of registration is no doubt greater in hundreds of cases than the tax assessed upon the value of the motor vehicle.

The object of the law is regulation of motor vehicles which endanger person and property, moving rapidly along the highway, and but for the registration there would be no redress for injuries done.

The amount of fee exacted, and the disposition of the "revenue" derived therefrom, disclose a manifest purpose to raise money by way of revenue for two purposes; one to expend on the roads of the state, the other to add to the general revenue of the state. No one can read the law without being so impressed. The purpose is to create a fund. And it matters not how much it may be claimed that the contribution for the benefit of the road is to be considered as a highly meritorious and useful purpose, the fact remains that it is unjust, discriminatory and destructive of the principle of equality.

The manifest purpose to add to the general revenue of the state can not appeal to one's sense of justice in the slightest degree. Increasing the fees by graduation according to the horse power and taking two-thirds of the fund for general revenue purposes is the plainest kind of effort to seize the opportunity for raising the fees for purposes of revenue.

Even the provision imposing such a burden on the owners of vehicles, as to produce a fund of \$276,155.10 beyond the expense of operating the department to be used in the maintenance and repair of the roads is a species of unjust and discriminatory taxation, destructive of the principle of equal burdens and taxation. This is so because such owners already are subjected to their shares of all road tax provided by law.

The act in question does not impose a license tax. For a license tax is imposed on a business or occupation merely for the purpose of raising revenue. *In re Guerrero*, 69 Cal., 88; *Schmidt v. Indianapolis*, 168 Ind., 631; *Kansas City v. Grush*, 151 Mo., 128; *Ellis v. Frazier*, 38 Ore., 462; *Matthews v. Jensen*, 21 Utah, 207.

A license is merely the permission or authority to do some act. A license is a privilege, granted by competent authority, to do that which would be unlawful without such privilege. *State v. Hipp*, 38 O. S., 199, 226; *Anderson v. Brewster*, 44 O. S., 576; *Wilkie v. Chicago*, 188 Ill., 444 (80 Am. St., 182).

1913.]

Jane v. Graves.

"The thing to be done may be something lawful in itself and only prohibited for the purposes of the license; that is, prohibited in order to compel the taking out of a license." *State v. Hipp*, 38 O. S., 199 (the law itself is the license); *Hubman v. State*, 61 Ark., 482, 489.

"A license being in the nature of a privilege, it would be a strange incongruity to grant to one a privilege of bearing the burden of a tax. * * * The two things are entirely distinct in their characteristics. The license may exist without the imposition of a tax, and the tax may be imposed without the granting of a license." *Anderson v. Brewster*, 44 O. S., 576, 588.

The power to license certain classes of business is to impose a charge in the form of a tax, and enforce the payment of the tax as a condition to the lawful prosecution of the business. 38 O. S., 225; 1 O. S., 268; 11 O. S., 534. This relates only to employments which in one form or another, impose burdens upon the public. Such tax can not be imposed merely for general revenue, for the only mode of raising such revenue is found in the twelfth article in the Constitution. 38 O. S., 225; 5 O. S., 243, 589; 18 O. S., 237.

It could not be employed as a mode of taxing property, without reference to the uniformity and equality required in Section 2 of Article XII of the Constitution. *Baker v. Cincinnati*, 11 O. S., 534.

"A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation." *State v. Hipp*, 38 O. S., p. 226.

Motor vehicles impose a burden on the public different from other vehicles in that there is greater danger from injury to persons therefrom. The licensing of automobiles is considered a valid exercise of the police power. *Conklin Lumber Co. v. Chicago*, 127 Ill. App., 103; *Umven v. State*, 73 N. J. L., 529.

"A license fee should be such a sum of money as will compensate for the expense of issuing the license certificate and for the probable expense of regulating and controlling the operation of the automobile licensed." *Van Hook v. Selma*, 70 Ala., 361 (45 Am. Rep., 85); *Jacksonville v. Ledwith*, 26 Fla., 163 (9 L. R. A., 69); 23 Am. St., 558; *Price v. People*, 193 Ill., 114 (86 Am. St., 306); *Littlefield v. State*, 42 Neb., 223 (28 L. R. A., 588; 47 Am. St., 697); *Baker v. Cincinnati*, 11 O. S., 534; *Berry, Automobiles*, Section 84.

"Anything in excess of an amount which will defray such necessary expense can not be imposed under the police power, because it then becomes a revenue measure." *Berry, Autos*, Par. 84; *In re Guerrero*, 69 Cal., 88; *Schmidt v. Indianapolis*, 168 Ind., 631; *Kansas City v. Grush*, 151 Mo., 128; *North Hudson R. Co. v. Hoboken*, 41 N. J. L., 71; *New York v. Second Ave. R.*, 32 N. Y., 261.

A license fee of \$2 for registration of an automobile is reasonable. *Com. v. Boyd*, 188 Mass., 79. Likewise a fee of \$1. *Umven v. State*, 73 N. J. L., 529.

"What is a reasonable fee must depend largely upon the sound discretion of the Legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable unless the contrary appears upon the face of the law itself, or is established by proper evidence." *Berry*, Section 84; *Gamble v. Montgomery*, 147 Ala., 682; *Atkins v. Phillips*, 26 Fla., 281 (10 L. R. A., 158); *Spiegler v. Chicago*, 216 Ill., 114; *Iowa City v. Newell*, 115 Ia., 55; *State v. Snowman*, 94 Me., 99 (50 L. R. A., 544; 80 Am. St., 380); *Willis v. Standard Oil Co.*, 50 Minn., 290; *Littlefield v. State*, 42 Neb., 223 (28 L. R. A., 588; 47 Am. St., 697); *Oil City v. Trust Co.*, 11 Pa. Co. Ct., 350.

"In determining whether a fee required for a license is excessive, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and if the amount is wholly out of proportion to the expense involved, it will be declared a tax." *Berry*, Section 84; *Ex parte*, 141 Cal., 204, 206.

If revenue is incidentally derived which is not so disproportionate as to make the fee charged unreasonable, there can be no objection. *Berry, Auto.*, Section 86, and cases cited. See *State v. Hudson*, 78 Mo., 302.

It is held, however, that the law expressly directs that the fund derived from the license fee shall be used for purposes other than defraying the expenses of issuing the license and of regulation, that it thereby makes of the fee a tax, and converts what was intended to be a police measure into a revenue law. *Berry*, Section 87; *Chicago v. Collins*, 175 Ill., 445 (49 L. R. A., 408; 67 Am. St., 224); *Livingston v. Paducah*, 80 Ky., 656; *Ellis v. Frazier*, 38 Oreg., 462.

Thus it was declared that an ordinance imposing a license fee on vehicles and providing that the money so derived should be held as a special fund for improving the city streets, created

1913.]

Jane v. Graves.

a double tax, which rendered it invalid, the same vehicles having been taxed for general purposes, at their value, as personal property. Such a rule clearly shows how discriminating it is to accumulate a large surplus from a registration fee to improve the roads. People may be willing to stand it, but that does not add to the lawfulness of the law. *Id.*, *Chicago v. Collins*, 175 Ill., 445, etc., cited above.

In this case the demurrer admits the accumulation of a large surplus into a fund, a part of which goes to the general state road fund, but two-thirds of it is to be used as part of the general revenue fund of the state.

The great amount of surplus above the cost of operating the department and the use to which it will be put, there being absolutely no police regulation further than the list of owners with the numbers of the vehicles, renders the imposition so wholly and palpably unreasonable as to invalidate the law because it is an imposition of a tax instead of a license.

But there is another view to be taken of the law. Motor vehicles are a lawful means of locomotion on the highways. Owners of such vehicles have the same rights as other vehicles. Not only are these rights recognized and enforced by the courts, but by statutes as well. *Berry, Auto.*, Section 18; *House v. Cramer*, 134 Iowa, 374 (10 L. R. A. [N. S.], 655).

The right to travel in the highways by means of motor vehicles is as much within the right of the owners thereof as it is in the owners of any other kind of vehicle. The right of the public to use the highways and streets for purposes of travel is the right to use them in the recognized methods in which the public highways are used.

A license being regarded as a privilege can not possibly exist with reference to something which is a right, free and open to all, as is the right of the citizen to ride over the highways by motor vehicle, or horse vehicle in a reasonable manner. *Chicago v. Collins*, 175 Ill., 445 (67 Am. St., 224).

Strictly speaking, the law under consideration in this case is not a license law. It distinctly recognizes the right of owners to use the highways, because it says nothing about such right. The law is just what it purports to be; it is a registration law. The only penalty prescribed is a fine, if the tag or placard containing the registration number and mark is not displayed on

the front and rear of the motor vehicle as an identification mark, securely fastened so as not to swing. It is a police regulation wherein there is an attempt to create revenue under the guise of police regulation, which is so palpable and clear as to render it invalid because not within the power of the Legislature to enact. The Constitution not authorizing the Legislature to thus raise a revenue, either for the improvement of roads, or for general state revenue, it is the province and duty of the court expressly required of it by the Constitution to declare the law as found in the Constitution, and to declare the act invalid. *Mugler v. Kansas*, 123 U. S., 623, 661.

As stated by the Supreme Court, the authority to tax is regulated by Section 2 of Article XII of the Constitution, which provides that laws shall be passed, taxing by a uniform rule all real and personal property.

The clear purpose of the amount exacted from owners of motor vehicles by the law in question is to produce a fund for road purposes and for general revenue purposes under the guise of regulation, which makes it a tax and destroys the uniformity of taxation fixed by the Constitution. The obvious purpose of the amendment increasing the fees according to horse power, and leaving two-thirds of the surplus in the general revenue fund, was to increase that fund. There is no more trouble or expense in registering a motor vehicle of twenty horse power than in one sixty, and there can be no purpose whatever in that graduated fee, except increased revenue, because there is absolutely no different purpose to be subserved in registering a motor vehicle of sixty horse power and one of twenty. The registration has an object and purpose as before pointed out, which is the same as to any horse power. The graduated fee according to the horse power is a mere guise or subterfuge to obtain the increased revenue.

The act being clearly a tax measure, it constitutes double taxation, and is in direct conflict with and unauthorized by Article XII, Section 2 of the Constitution.

The law is unconstitutional and invalid. The demurrer to the petition is overruled; the petition states a good cause of action.

A temporary injunction is allowed as prayed for upon giving a bond in the sum of \$500.

1913.]

Weingertner v. Railway.

CONTRIBUTORY NEGLIGENCE CONSTITUTING PROBABLE CAUSE.

Common Pleas Court of Hamilton County.

HARRY WEINGERTNER ET AL V. OHIO ELECTRIC RAILWAY CO.*

Decided, July 7, 1913.

Negligence—By a Chauffeur at an Interurban Crossing—Finding by the Court as to What a Reasonably Prudent Man Would Have Done Under the Circumstances.

The court holds as a matter of law that a reasonably prudent person would not drive an automobile upon the track of an interurban road, after stopping at a point where he could not see whether or not there was a car approaching, when the circumstances were such he could have easily so placed himself as to have seen the approaching car or by stopping his engine he could have heard it; and having failed so to do the plaintiff was guilty of contributory negligence of such a character as to constitute proximate cause of his injury from being struck by the approaching car.

Kelley & Hauck, for plaintiff.

Paxton, Warrington & Seasongood, *R. S. Marx* and *Shepherd & Shepherd*, contra.

DICKSON, J. (orally).

The plaintiff, a minor, a chauffeur, was seriously injured at the intersection of the Van Zandt road and the Hamilton pike, this county, by the automobile he was driving coming into collision with an electric car. At the conclusion of the plaintiff's evidence the defendant moved for an instructed verdict in its favor, because among other reasons the plaintiff, as appeared by the evidence offered in his behalf, was guilty of contributory negligence.

To be guilty of contributory negligence both parties must have been negligent; the plaintiff must have been negligent; and his negligence a proximate cause of his injuries, i. e., a cause without which he would have been whole. The evidence discloses that the plaintiff was driving an automobile east on the Van Zandt road intending to turn south on the Hamilton pike.

* For previous opinion in the same case, see 12 N.P.(N.S.), 659.

and that he well knew it was necessary for him to cross the defendant's track in order to do this; that he was familiar with this railroad crossing; that he knew he could not see a car coming from the north until very near the track, that he voluntarily stopped at a place where he could not see a car coming from the north; that he looked and of course did not see such a car; that he did not stop his engine, which was making a noise, and did not hear an approaching car—that then he with such knowledge gained by such looking and listening voluntarily started ahead at such speed that the collision quickly followed, with its most unfortunate results.

Was such conduct under such circumstances negligence? The test is, would ordinarily a reasonably prudent person have thus acted under such circumstances? Who is this reasonably prudent person, and under what circumstances is the duty of the court, or when is it the duty of the jury, to "find" him? Clearly if there be a conflict in the testimony, evidenced merely by a scintilla, such duty rests with the jury under proper cautions by the court. But if there be no conflict at all, then clearly it becomes the duty of the court to pass on the evidence thus become a matter of law.

Here there is no evidence—no scintilla in favor of the plaintiff—and the court must decide—without shrinking—whether this plaintiff acted as a reasonably prudent person. Would this plaintiff, had he been a reasonably prudent person, voluntarily have gone onto a railroad track where he was likely to meet an heavy electric car, from a place of known safety and under circumstances such that he could neither see nor hear an approaching car, and too when he could have placed himself at a point of vantage where he could easily have seen the rapidly approaching car, and could have easily stopped his engine and thus heard it.

It is the painful duty of the court to find as a matter of law, and the court so finds, that the plaintiff did not act as a reasonably prudent person under the then circumstances—and thus to instruct a verdict for the defendant—which is now accordingly done.

1913.]

Miller v. Mellen Co.

LIABILITY OF FLORISTS' STOCK FOR TAXATION.

Common Pleas Court of Clark County.

RALPH B. MILLER, TREASURER, v. THE GEORGE H. MELLEN CO.

Decided, September 2, 1913.

Taxation—Plants and Floral Stock Constitute a "Growing Crop"—No Implied Exemption in Ohio of Personal Property from Taxation—Section 5560.

1. Growing plants and growing floral stock comprising the stock of a florist and raised in earth and soil in greenhouses, either in benches or in pots or other receptacles therein, filled with earth and soil and cultivated and cared for in order to be brought to sale, constitute a "growing crop."
2. The provision of Section 5560, General Code, that in assessing real estate for taxation the valuation shall be made, "excluding the value of the crops growing thereon," neither classifies such crops as either real or personal property, or exempts or excludes them from taxation.
3. Growing crops are sometimes considered in law as personalty, and sometimes as partaking of the nature of realty.
4. Growing plants and floral stock, cultivated for the purpose of sale, and which the owner treats as merchandise, to be sold to whomsoever may apply, are personal property and subject to be returned and taxed as such under the provisions of Sections 5325, 5328 and 5376, General Code.
5. All personal property in Ohio is subject to taxation, except such as is expressly exempted, and no implied exemption or exclusion from taxation can be read into a statute.
6. The Constitution of Ohio requires the Legislature to pass laws providing for the taxation of all property in the state, and the Legislature having acted in pursuance of such requirement, the courts will not presume that it has failed to include in such taxation any class or species of property, either through oversight or by design.

Chas. E. Ballard, Prosecuting Attorney, and Lawrence E. Laybourne, for plaintiff.

Edwin S. Houck and Martin & Martin, contra.

JONES, J.

The plaintiff filed his petition as treasurer of Clark county, seeking to recover a judgment against the defendant for certain personal taxes charged against it on the tax duplicate, and remaining unpaid.

The answer of the defendant in full, is as follows:

"Now comes the George H. Mellen Company, the defendant herein, and says that it is a corporation, duly organized under the laws of the state of Ohio, for the purpose, among other things, of growing, dealing in and selling plants and floral stock of all kinds, and having its principal place of business in the city of Springfield in said state.

"Answering the petition of plaintiff herein, said defendant admits:

"That plaintiff was, at the time of filing said petition, and still is, the duly elected, commissioned, qualified and acting treasurer of Clark county, Ohio.

"That personal taxes, to the amount of \$272.18, for the years 1907 and 1908, stand charged against this defendant, on the duplicate of taxes of said county, placed in the hands of plaintiff, for collection, by the auditor of said county.

"And that said taxes are unpaid.

"Further answering said petition, this defendant says:

"That all of the property, on which the taxes aforesaid, for the years aforesaid, were levied and charged against this defendant, consisted of growing plants and growing floral stock, which, on the respective days of each of said years, as of which taxes on personal property were levied, to-wit, on the day preceding the second Monday of April of each of said years, were attached to, inhered and were growing in earth and soil in greenhouses, either in benches or in pots or other receptacles therein, filled with earth and soil, designed and used exclusively for raising and growing therein plants and other floral stock, and that all of the property aforesaid, sought to be taxed as aforesaid, was, on the dates aforesaid and for varying periods thereafter, accordingly as it matured and was removed, from said soil, for transplanting or for sale and delivery, a growing crop and not subject to taxation under the laws of the state of Ohio.

"That the board of review of the city of Springfield, in said Clark county and state of Ohio, against the protest of this defendant and without its consenting thereto in any wise, added the property aforesaid, for the years aforesaid, to the returns of personal property, in said city of Springfield, of this defendant, for said respective years.

"That said board of review, arbitrarily and without warning of fact or law, valued said property, for the year, 1907, at \$5,180, and for said year, 1908, at \$5,000, and added said respective amounts to said returns of personal property, of this defendant, for said respective years.

1913.]

Miller v. Mellen Co.

“That said sum, sued for by plaintiff herein, is made up entirely of the taxes on said added amounts for said respective years.

“And that defendant denies each and every other allegation of said petition not herein specifically admitted or denied.”

To this answer the plaintiff filed a motion to require the defendant to separately state and number its defenses, and immediately thereafter filed a general demurrer.

Counsel for plaintiff have stated that they are not specially insistent on the motion, and the court regards the answer as really stating but one defense. While it is averred that the valuation of the property for taxation was made arbitrarily and without warrant of fact or law, there is no distinct averment that such valuation is in excess of the real value of the property, and there is no averment of any element of fraud in the action of the board, so the court is inclined to treat the averment just referred to, rather as a conclusion drawn from the facts previously recited, than as a separate defense; a position which seems to be in accord with the argument. The motion will therefore be overruled, and the court will proceed to consider the demurrer.

The position taken by the defendant is:

1st. The property covered by this assessment is a growing crop.

2d. Growing crops are not subject to taxation under the laws of Ohio.

That is to say that even if this class of property has not by legislation been expressly exempted from taxation, yet on the other hand no legislation has ever been enacted making it so subject. It is further said that while the Constitution provides that laws shall be passed taxing all property, yet the provision is not self-executing, and that the Legislature, whether by oversight or by design, has omitted to enact any statute that provides for the taxation of a growing crop.

On behalf of the plaintiff it is argued that even if a florist's stock be regarded as a growing crop, it is personal property, as defined by Section 5325, which includes “every tangible thing being the subject of ownership, whether being animate or

inanimate, other than money, and not forming part of a parcel of real estate," and as such it is subject to taxation under the sweeping provisions of Section 5328, General Code, which makes all personal property in the state subject to taxation, except such as is "*expressly exempted therefrom.*"

While it is not customary to speak of plants, shrubs and flowers as "crops," growing or otherwise, yet on consideration there seems to be no reason why they should not be so classified. Such articles in a florist's stock are the product of what is planted in the ground, and become the subject of man's cultivation and labor and skill. They grow in and derive sustenance from the earth, whether the earth remains in its natural location, or is placed in boxes, pots or other receptacles. True the courts have usually employed the term "annual" products, in defining crops, but as is pointed out in defendant's brief, such a limitation is too narrow, as there are at least some crops that do not mature in a single year, and in certain localities more than a single crop may possibly be produced in the same year. This court is therefore ready to adopt the argument of defendant's counsel, that a florist's stock may be classified as a "growing crop."

Much stress is laid on the provision of Section 5560, General Code, that "each separate parcel of real property shall be valued at its true value in money, *excluding the value of the crops growing thereon.*"

This is a plain and peremptory direction of the assessing officers? Does it imply any meaning further than it carries on its face? Does it seek to classify growing crops as either real or personal property, or by any implication to exclude them as subjects for taxation?

As to any classification the Supreme Court has not thought of considering this provision as having such effect. Indeed that court has held that growing crops are sometimes considered as personalty and sometimes as partaking of the nature of realty. See *Baker v. Jordan*, 3 O. S., 438; *Youmans v. Caldwell*, 4 O. S., 72; *Herron v. Herron*, 47 O. S., 544.

Among other attributes of personalty it is established that they are subject to levy and sale on execution, and that on a con-

1913.]

Miller v. Mellen Co.

veyance of realty they may pass or be reserved by parole agreement.

Mr. Freeman, in his work on Executions, says:

“Section 113. The decisions holding certain crops to be personal estate and therefore subject to execution have generally embraced nothing beyond those crops, which, being sown or planted are capable of reaching perfection within one year. But we think that a crop which could not reach perfection in less than two or three years would also be personal property, if its growth can be regarded as chiefly attributable to the skill and labor of the owner. We think too, that the purpose for which the product is cultivated may be taken into consideration in determining its character as real or personal estate. Thus, fruit trees planted in an orchard to permanently enhance the value of the real estate ought to be regarded in a very different light from trees growing in a nursery for the purpose of sale, and which the owner treats as merchandise to be sold to whomsoever may apply.”

This language is appropriate to the discussion of more than one phase of the present case.

It seems to the court that the object of the Legislature in excluding the value of growing crops from the assessment of real estate for taxation is quite obvious, and is in accord with justice and common sense. At the time that the original of Section 5560, General Code, was enacted real estate was only appraised for taxation once in ten years, and the valuation once made stood unchanged for the whole of the decennial period. Even now the valuation stands for four years before a re-appraisement is had. It is perfectly apparent that it might happen that at the date of appraisement the value of the growing crop might be large, small, or possibly there might be no crop at all, and that it would be unjust and absurd to enhance or diminish the value of the ground for the succeeding nine or three years as the case might have been, while the condition might change from year to year. The real estate owner who happened to have a promising crop at the time of appraisement would have to pay an increased tax for a succeeding period of years in which he might have poor crops, or even plant no crop at all, while the owner who had no crop at all at the appraisement period, would profit at the expense of the state during successive years of profitable

cultivation of the same land. In adopting this part of the statute the court thinks that the Legislature had no other object in view than that indicated, and in view of the provision of Section 5328, General Code, which requires the exemption from taxation to be *express*, the court does not think that any exemption can be read into Section 5560 by implication.

But it is said that growing crops have never been taxed in this state. If they are proper subjects of taxation, the failure of the owners to return them, or of the taxing authorities to require them to be returned, however long continued, does not transfer them to the exempted list. In other words it might be said that immunity from taxation can not be acquired by prescription.

But there is probably a very good reason for the fact referred to (assuming it to be the case) and one which does not reflect upon the good conscience of either the taxpayer or the assessor. Returns of personal property for taxation are made in Ohio between the second Monday in April and the third Monday in May—usually near the first part of the period, and covering the property owned at the first mentioned date. On the second Monday in April it would be impossible to say within any certainty, at least as to the great majority of crops, whether they ever would have any value; to be sure whether they had commenced to germinate. Sometimes they might not then even be sown. Many conditions might attend the advancing season that would affect the growing crop, and its value, when just sown, can hardly be said to be anything more than speculative. If personal property had to be returned for taxation in June or July it is highly probable that growing crops would cut quite a figure in the list.

It is said the taxing period comes at a time when florist's stocks are large, and a hardship is thereby worked upon them. This may be true but the same might be said of any property owner who has a more than ordinarily large amount of personalty in his hands on the return day.

It is well known that the business of raising and selling plants and flowers is often carried on upon a large scale, and often in a profitable manner. The florist, like other business men, engages in his occupation to supply a public demand for certain

1913.]

Miller v. Mellen Co.

articles that gratify the eye and the sense of beauty, and he does so with the object of reaping a profit. No apparent reason exists why the Legislature should intend to exempt his wares from taxation, or why they should be exempted, any more than the merchandise of any kind in which anyone else trafficks as a means of livelihood and profit. Nor is it claimed by the defendants that such reason exists—it should be said to prevent what might seem a possible reflection upon them, that they are not here claiming that they should be a privileged class, but simply that under the existing law they are not required to pay taxes on their stock.

This court thinks that there is sufficient authority under the provisions of Section 5376, General Code, for the listing of this stock for taxation as personalty, and that considering it as a growing crop it is neither exempt from taxation, or unincorporated in the legislative provision as to what shall be taxed.

In conclusion it may be added in view of the constitutional mandate requiring the Legislature to pass laws providing for the taxation of all property, and the comprehensive language of the statutes enacted in compliance with that enactment, that the court will be slow to presume that the legislative body either intentionally ignored the constitutional requirement as to one certain class of property, or failed in its duty by oversight or negligence. It would seem that one of these presumptions must be entertained, if it be held, either that the Legislature has exempted this class of property from taxation directly, or has made no provision by which it could be taxed. And as the exemption would have to be express, and no express exemption exists, then in the absence of such express exemption the property in question can not escape taxation.

Counsel have presented the case in a very able and interesting manner, which is duly appreciated. They frankly say that they are unable after much research to find any reported case which would be of any particular aid as a precedent or as having persuasive force, nor has the court been able, after a good deal of labor, to find other authorities that might have aided it. The court however has concluded that a proper solution of the questions presented can be reached by an examination of the

statutes themselves, with some little additional sidelights from the few authorities heretofore referred to.

For the reasons heretofore given the demurrer to the answer is sustained.

RATES OF FARE TO TERRITORY ANNEXED TO A MUNICIPALITY.

Common Pleas Court of Hamilton County.

THE CITY OF CINCINNATI V. THE INTERURBAN RAILWAY & TERMINAL COMPANY ET AL.

Decided, September 17, 1913.

Interurban Railways—Provisions of Village Relating to Fares—In the Event of Village Being Annexed to Adjacent Municipality—Authority of Village to Fix Rates of Fare Beyond Its Own Boundaries.

Where an interurban railway accepts an ordinance passed by a village granting it the permission to lay tracks through the village, and where, by the terms of such grant, it is expressly provided as one of the conditions of the grant, "Should the village of Pleasant Ridge be annexed to the city of Cincinnati the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents," said interurban railway, after annexation of the village, is bound by such a condition and can not charge more than five cents as a rate of fare.

Alfred Bettman, City Solicitor, for plaintiff.

Dinsmore & Shohl, contra.

MAY, J.

This is an action brought by the city of Cincinnati, by its city solicitor, against the Interurban Railway & Terminal Company and the Rapid Railway Company, to enjoin the defendants from charging passengers on their car or cars any rate of fare in excess of five cents for a ride in either direction between any point in that portion of the city of Cincinnati formerly constituting the village of Pleasant Ridge and the Cincinnati terminus of said cars and from charging passengers on their cars any rate of

1913.]

Cincinnati v. Interurban Railway.

fare in excess of five cents for a ride in either direction between any point in said territory formerly constituting the village of Pleasant Ridge and any other point in the city of Cincinnati on the line of travel of said cars.

At the hearing the following facts were proved:

In September, 1901, the village of Pleasant Ridge published an ordinance directing its clerk to give notice that the Rapid Railway Company had made application to the council of the village of Pleasant Ridge for the right to construct, maintain and operate a street railway over Montgomery road from the east corporation line to the west corporation line and that bids for the right to construct and operate said street railway would be received by council. In pursuance of said advertisement the Rapid Railway Company submitted its bid for rates of fare over its road. Nothing was said in this bid regarding the rate of fare after annexation of the village. Before the ordinance granting the Rapid Railway Company the right to construct, maintain and operate its railway along the proposed route was adopted, the bid was amended to include the offer of a five cent fare between any point in the village and the Cincinnati terminus of the road after annexation of the village, and in the ordinance passed on the 6th of November, 1901, and repassed on the 19th of November, 1901, in Section 6, where the rate of fare is set out, the following paragraph appears:

“Should the village of Pleasant Ridge be annexed to the city of Cincinnati the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents.”

On November 26, 1901, this ordinance was accepted by the Rapid Railway Company. The Rapid Railway Company is now owned by the Interurban Railway & Terminal Company. The village of Pleasant Ridge was annexed to the city of Cincinnati on the 6th day of November, 1912. The defendant company is charging a seven cent rate of fare as provided originally in the ordinance.

The company contends that the village of Pleasant Ridge had no authority under the statutes to insert the clause providing

for rate of fare after annexation of the village for the reason that the council of said village was without authority to fix the rate of fare beyond the limits of the village, and further that the original call for bids did not contain any mention of the rate of fare after annexation.

The sole question in this case, therefore, is, whether the village had authority to insert in the franchise this provision for the rate of fare after annexation of the village.

In the view that I take of this case, it is immaterial whether in inserting certain terms and conditions the village proceeded under Sections 3768, 3769 or 3770 of the General Code, or under Sections 9100 to 9122, inclusive, of the General Code.

Under Section 3768 of the General Code, council may prescribe the terms and conditions upon which a street railway may be constructed, and under Section 9113 of the General Code council or the county commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated. And under Section 3778 of the General Code, which was passed after the franchise in question was granted, it is expressly provided that "council of any municipality may grant a franchise on such terms and conditions as it may prescribe."

The policy of the Legislature, therefore, under all the sections relating to the construction or building of street railways, whether strictly within the limits of the municipality or interurban, was to permit council to fix the terms and conditions on which such grant should be given.

Unless, therefore, there is an express statutory provision prohibiting the council of any village or municipality from fixing the rate of fare to be charged from the village or municipality to a point outside of the village or municipality, the council may provide that a given rate of fare shall be one of the terms and conditions on which the grant is given. This necessarily follows from the ruling of the Supreme Court in the case of *Interurban Railway & Terminal Company v. Cincinnati*, 75 Ohio State, 196. At page 213, the court says:

"The rate of fare to be charged by a street railway company may be made one of the terms of the grant to it of the right to occupy the streets."

1913.]

Cincinnati v. Interurban Railway.

And in *State v. Dayton Traction Company*, 64 Ohio State, 272, the court affirmed the decision of the circuit court, which is found in 18 Circuit Court, 491. In the decision in the circuit court, Judge Summers, speaking for the court, held at page 500, that the council may refuse permission to a street railway to construct its roads in its streets, and may impose any conditions not in conflict with its statutory powers, that is, it can not impose conditions inconsistent with the rights granted by the state.

Inasmuch as I can not find any statutory provisions, as already stated, which prohibit the power of the village or city council to fix the rate of fare beyond the limits of the municipality or village, it necessarily follows that when the council of the village of Pleasant Ridge provided that one of the terms and conditions of the grant should be a five cent rate of fare after annexation of the village and the company accepted the franchise with this condition, that the company can not now be heard to complain and set up that this is an illegal provision.

The defendants cite in support of their contention that the provision is illegal and beyond the power of the village, the case of *Farmer v. Columbiana County Telephone Company*, 72 Ohio State, 526.

It is true that in that case the Supreme Court held that the city of Salem could not fix the rate to be charged by a telephone company in granting it a right to use its streets. Judge Spear, at page 532, speaking for the majority of the court, said:

“It follows from what has preceded (*i. e.*, the right to construct poles, wires, etc., was a right received from the state and not the city), that the municipality possessed nothing in the way of a valuable right to bestow upon the company. Hence the promise of the company to do what it was not, and could not by the city be required to do, was a naked promise, without consideration.”

In the case at bar, however, the village of Pleasant Ridge, through its council, granted the railway company a valuable right, that is, the right to construct and operate a street railway through the village and without this right being granted the defendant railway company could not have operated its street

railroad. This distinguishes the case at bar from the ruling in the Supreme Court in *Farmer v. Telephone Company*, *ubi supra*. This view has been taken by Judge Washburn in *Elyria Traction Company*, 8 N.P.(N.S.), 85, and by Judge Kinkead in *City of Columbus v. Columbus Citizens Telephone Company*, 10 N.P.(N.S.), 433.

The Supreme Court of Michigan, in *Rice v. Detroit Railway Company*, 122 Mich., 677, held that a village had the right to fix the rate of fare to some other village or city and make this rate of fare one of the terms and conditions upon which it would give its consent to a grant to the railway company. The court said:

"It is contended that the franchise is in force only within the territorial limits of the village and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce. The defendant saw fit to contract with the village of Dearborn for a rate outside of the limits of the village. This contract it can not repudiate."

This case was approved and followed in *Vining v. Detroit Railway Co.*, 133 Mich., 539, and on investigation of the Michigan statutes fails to disclose that they differ from our Ohio legislation on this subject.

It is the law generally that where a municipality's consent is necessary to the construction of a street railway upon a public street, the municipality may impose such reasonable conditions, precedent or subsequent, for the enjoyment of the franchise as it may deem necessary or proper, providing it does not exceed its constitutional or statutory power. See *Booth on Street Railroads*, 2d Ed., 29; 1 *Nellis on Street Railroads*, 2d Ed., Sec. 46; 4 *McQuillan on Municipal Corporations*, Sec. 1644; 3 *Dillon, Municipal Corporations*, 5th Ed., Sections 1229 and 1230. The language of the text in the foregoing authoritative works is borne out by the cases cited.

In denying the right of the city to fix telephone rates in *Farmer v. Telephone Company*, *ubi supra*, the court says:

1913.]

Brown v. Manufacturing Co.

"But before leaving the subject we feel impelled to express our strong condemnation of lamentable want of fair dealing shown on the part of the defendant company in its transactions with municipal authorities. * * * If the pleadings truly state the situation the company's action was in a high degree reprehensible. Were there any ground which this court could regard as substantial for such action the court would take pleasure in granting the relief asked for and thus administer a deserved rebuke; but there seems none."

Taking the view of the case that I have, finding that there is express authority in the statutes giving the village council power to fix, as one of the terms and conditions of the grant, the rate of fare after annexation of the village, finding nothing in the statutes expressly prohibiting this right, and finding further that the city gave to the defendant railway company a very valuable right, I necessarily must grant the relief prayed for.

A decree in accordance with this finding may be prepared.

CONSTRUCTION OF WORKMEN'S COMPENSATION ACT.

Common Pleas Court of Franklin County.

CHARLES P. BROWN v. THE JEFFREY MANUFACTURING COMPANY.

Decided, March 11, 1913.

Master and Servant—New Compensation Act Does Not Create Liability Without Fault—Employe Pulls Stool From Under a Fellow Employe, Who Fell and Was Injured—Petition Against Employer for Damages Demurrable—Section 1465-60.

An employer is not liable under the workmen's compensation act for an injury to an employe caused by a mischievous act by a fellow employe not in the course of his employment.

Hugh Huntington, for plaintiff.

Arnold & Game, contra.

The allegations in the petition so far as the point raised by the demurrer, passed upon by the court, is concerned are as follows:

"On September 26, 1912, shortly after the noon hour, this plaintiff in the course of his employment and under the direction

of a foreman was seated on a stool operating the drill press above referred to. Plaintiff leaned forward in the course of his employment and under the direction of his foreman to turn on a small water valve connected with the drill press. His duties required him so to do many times through a working day. While leaning forward, John Blakesly, an employe of this defendant, wrongfully pulled the said stool from under plaintiff causing plaintiff to fall to the floor. While falling to the floor plaintiff struck his right elbow on the edge of a steel bucket which steel bucket was filled with iron bolts. The edge of said steel bucket was rough and was covered with dirt and grease. The blow of the arm on the edge of the bucket caused a cut and bruise upon said right elbow, leaving his right arm stiff and weak."

BIGGER, J.

In my opinion the petition is demurrable.

If the construction contended for by plaintiff's counsel is to be put upon this provision of the statute, I think it would be clearly in violation of the nineteenth Article of the Bill of Rights which provides that private property shall ever be held inviolate but subservient to the public welfare. It is not averred in the petition that the defendant was guilty of any wrong or neglect or default whatever, but the right to hold that the defendant is liable in damages is claimed by virtue of the language of the act of May 31, 1911, which act was decided by the Supreme Court to be constitutional. The point here raised, however, was not raised or discussed by counsel in that case, and was not considered by the court in so far as the scope of the consideration of the act by the court is disclosed by the opinion in the case. On the contrary, counsel representing the relator say in their breif at page 355:

"It clearly appears that there is no attempt here to create a liability without fault as in the New York statute," etc.

The common law, and the law of this state as it existed before the passage of this act, did not recognize a liability of the master, except for his own fault of wrong and for the wrongs committed by his agents while acting within the scope of their agency, which wrongs are attributable to him. It was never the law that an employer was liable for torts committed by his agent and servant outside the scope of his employment. He was liable for the torts of his agents and servants committed within the scope of

their employment. This principle of liability rests upon principles of justice and equity, and upon the principle that the employer controls the acts of his servants which are within the scope of his employment and reasonably and justly hold him liable for the wrongful acts of his agents done while carrying out the thing committed to his care. But the rule ceases where its reason ceases to exist, and for the wanton and malicious acts of the servant or agent outside the scope of his employment the master was never held liable. But upon what principle of right or justice can a man's property be taken by law and given to another when he is guilty of no fault or neglect whatever, and when the wrongful act was not done within the scope of the employment of his agent or servant? Private property can not be taken by law for private use, but only for public use, when the public welfare demands it. It is not apparent that the public welfare is to be subserved by holding a person liable in damages, if one man wantonly assaults and injures another, merely for the reason that he happens to employ both of them. It would certainly be somewhat of a surprise to the profession generally to learn that under the statute, when one of two employes murders the other while that other is engaged at his employment, that the employer is liable in damages for his death, merely because he also employs the murderer. In my opinion, to give the statute this construction, would be to render it obnoxious to the guaranty of the Constitution of the inviolability of private property. Nor did the Supreme Court give it the construction contended for. On the contrary, Judge Johnson says, at page 405, speaking of this act:

“It creates no new right or new remedy for wrong done.”

The contention of counsel is that it does create a new right, one that did not exist either at common law or by statute, to-wit, that an employer without wrong or default on his part shall be compelled to make compensation to one employe who is injured by another's wilful act not in the scope of his employment, but entirely without the scope of his employment. If this act creates no new right, as Judge Johnson says, then it clearly does not give a right of action to the plaintiff upon the facts stated.

Again it is said on page 392:

"So that an employer who elects not to come into the plan of insurance may still escape liability, if he is not guilty of wrongful act, neglect or default."

It is plain from the opinion of Judge Johnson that the Supreme Court construed this act as simply affecting the defenses which might be made in the cases provided for therein and not that it conferred rights of action against an employer which it did not before exist and indeed this is the plain statement of Judge Johnson as I have pointed out.

In my opinion, the language "in the course of employment" is to be applied as well to the person injured as to the one committing the injury. In construing an act, all of its different provisions are to be construed together. That this language applies as well to the person committing the injury as to the one injured seems to be very strongly reinforced by a consideration of the provisions of Section 21-2 of the act which provides that in the case of injury arising from the wilful act of an employer or his officers or agents to any employe in the course of employment and the employer has paid into the state insurance fund the premium provided for by the act, that it is optional for the injured employe to take under the provisions of the act or to institute a proceeding in the courts to recover his damage. In such case this act is not applicable and it is not to be supposed that the Legislature was ignorant of the fact that for wanton and wilful torts of an agent, the master is not liable except when the tort is committed within the course of his employment. The fact that the Legislature, therefore, provided that for the wilful torts of an agent the injured employe might either take under the statute or sue to recover his damages at law shows that the Legislature meant that it was only for wilful torts committed in the course of the employment that it was legislating about and not for a class of cases where there was no liability of law and for which injuries the injured employe could not maintain an action at law against the employer.

In the light of the above considerations I am led to the conclusion that the petition does not state facts which entitle the plaintiff to any relief, and the demurrer is sustained. The only right of action in such case is against the person who was the cause of the injury.

1913.]

Wulftange v. Cemetery.

LIABILITY FOR INJURY FROM FALL IN CEMETERY.

Common Pleas Court of Hamilton County.

**ANNA WULFTANGE V. THE PROPRIETORS OF THE CEMETERY OF
SPRING GROVE.**

Decided, September, 1913.

Cemeteries—Proprietors of, Liable for Negligence of Agents and Servants—Right of Action for Injury from a Fall on an Icy Walk.

In an action for damages brought against a cemetery association, by one who was injured while attending a funeral at the cemetery by falling upon a walk over which she was compelled to pass and which was rendered dangerous and slippery by an accumulation of ice and snow, the defense does not lie that the association is such an institution of public charity as to exempt it from liability for negligence of its agents and servants, notwithstanding it has no capital stock and no profits can accrue to its members.

Dolle, Taylor & O'Donnell, for demurrer.*Worthington & Strong*, contra.

GEOGHEGAN, J.

Heard on demurrer to third defense of answer.

The petition seeks to recover from the Proprietors of the Cemetery of Spring Grove, a corporation under the laws of Ohio, for damages sustained by the plaintiff while attending a funeral at the cemetery, it being alleged that the defendant carelessly and negligently suffered ice and snow to accumulate on a walk over which she was compelled to pass and that by reason of the dangerous and slippery condition caused by said ice and snow she was caused to fall and was injured.

Defendant in its answer admits that it is an Ohio corporation, incorporated under a local act passed January 21, 1845, and another local act passed March 21, 1849, and for a third defense sets forth the following:

“Defendant says that it is and always has been a public and charitable corporation; and that it was incorporated and organized, and is and always has been operated exclusively for the

purpose of providing a place for the proper interment and repose of the dead; that it has not, never has had, and can not have any capital stock; that it never has declared and can not declare dividends, and never has made and can not make profits for its members; that its funds and income are, and always have been, used exclusively for acquiring land for its cemetery, for laying out and maintaining the same, including the construction and repair of the buildings necessary therefor, and for preserving, protecting and embellishing said cemetery and the avenues leading thereto, and for paying the necessary expenses of the corporation, and that they will have to be used in the future for the same purposes.

“Defendant further says that any person may become a member of this corporation by becoming the owner of one or more cemetery lots as laid off by its board of directors, and that the owners of such lots have a right in fee simple thereto, exempt from execution, attachment, taxation, or any other claim, lien, or process whatever, for the sole purpose of interment under the regulations of the corporation, and with the assent of its board of directors may convey such lots, or any portions thereof, for such purpose; that the owners of said lots have the right of interment and perpetual repose both for their own bodies after death, and for any other bodies which they desire to have interred therein; and that all persons alike may thus acquire the lots and the rights and privileges aforesaid, so long as the corporation has land available for the purpose.

“Defendant admits that plaintiff had been present at the funeral services which had been held in its chapel in connection with the interment in said cemetery of the body of her friend, Mrs. Mary Garvey, as stated in her petition, and says that any injuries received by said plaintiff after leaving said chapel, were caused by her slipping and falling upon the sidewalk mentioned in said petition. And defendant further says that it had given its employes instructions to remove all ice and snow from said sidewalk within a reasonable time after their accumulation thereon, which instructions were in full force and effect at the time plaintiff received her injuries, and had been for a long time prior thereto.”

It will be observed from the reading of the language of the third defense that the defendant is relying upon that principle of law which relieves charitable institutions under certain circumstances from liability, under the doctrine of *respondeat superior*, for the negligent and careless acts of its agents and serv-

1913.]

Wulftange v. Cemetery.

The question then is, is the defendant, assuming for the purposes of the demurrer that the allegations contained in the third defense aforesaid are true, such an institution of public charity as to be exempt from liability for negligence of its agents and servants?

That it is not such has been expressly held by the Supreme Court of Massachusetts, in the case of *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass., 163. In that case it appeared that the defendant was incorporated under a special act for the purpose of establishing and perpetuating a burial place for the dead; that it had no capital stock, issued no certificates of shares, and paid no dividends or profits; that no pecuniary benefit whatever was received from the association; that all money received by the association from the sale of graves or otherwise was exclusively used for ornamenting the grounds, burying the poor, giving graves to public institutions, and carrying out the purposes for which the corporation was formed; that persons who were too poor to furnish funds for the burial of their deceased relatives were furnished with coffins and a hearse, and that upon the deaths of inmates of public and charitable institutions, the graves were, upon application, furnished for nothing. The plaintiff sought in that case to recover from the defendant for negligence of its employes in burying another person in a grave upon his lot, and the defense was made to the action that there could be no liability for this negligence under the rule that the doctrine *respondeat superior* did not apply to charitable institutions. The court in its opinion, rendered by Justice Holmes, after discussing the various Massachusetts cases wherein the doctrine of non-liability of charitable institutions was laid down and asserting that there could be no pretense that the defendant was acting as an agent for the city, uses the following language:

“We think that there is equally little ground for calling it a charitable corporation. Assuming for the sake of argument that that it would have no right to declare dividends to its members in case of realizing profits, there is nothing in the charter which compels the application of any part of its funds to charitable uses. It would be acting strictly within its powers if it sold all its lands for full price. The purpose of the charter is to secure

permanent care of graves, and such advantages to the persons interested as may be deemed incident to burial in such a cemetery. The beneficiaries are a definite number of persons clearly pointed out by law. St. 1841, c. 114, Sections 4, 5; *Old South Society v. Crocker*, 119 Mass., 1, 23; See *Evergreen Cemetery Association v. Beecher*, 53 Conn., 551; *Matter of Deansville Cemetery Association*, 66 N. Y., 569.

"The provision in the St. of 1841, c. 114, Section 3, that all the real and personal estate of the corporation 'shall be applied exclusively to purposes connected with, and appropriate to, the objects of such organization,' does not mean to exempt its property, and thus the corporation, from ordinary civil liabilities. There is a similar restriction, express or implied, in the case of a railroad.

"The fact that the funds received were actually applied to a considerable extent in charity, is no more material than evidence of a similar application of a part of his income by a private citizen would be, in a suit against him."

In my examination of the cases cited both by counsel for plaintiff and counsel for defendant, I have not found a case wherein a cemetery association has been exempted from liability under the doctrine that a charitable institution is not liable for the tortious acts of its servants or agents. In fact, this doctrine of non-liability seems by the better weight of later opinion to have been limited to actions by those who are beneficiaries of the charitable trust exercised by the corporation.

In *Horden v. The Salvation Army*, 199 N. Y., 233, decided September, 1910, the court, in syllabus 1, says:

"The beneficiary of a charitable trust may not hold the corporation, administering the trust, liable for the neglect of its servants, but this immunity does not affect the rights of those who are not such beneficiaries."

The court, in its opinion in that case (page 238), quotes the language of Judge Lowell of the United States Circuit Court, in the case of *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A., 122, 109 Fed., 294, as follows:

"One who accepts the benefit either of a public or private charity enters into a relation which exempts his beneficiary from liability for the negligence of his servants, in administering the charity; at any rate, if the benefactor has used due care in select-

1913.]

Wulftange v. Cemetery.

ing those servants. * * * It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. * * * If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants; if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but if a suffering man avails himself of their charity he takes the risk of malpractice, if their charitable agents have been carefully selected."

This same distinction was pointed out by the Supreme Court of Michigan, in the case of *Albin Bruce v. Central Methodist Episcopal Church*, 147 Mich., 230, wherein the defendant, a religious corporation, was held liable for injuries to a workman engaged in repairing its property through the negligence of its servant in furnishing an unsafe scaffold. In that case both Carpenter, Chief Justice, and Ostrander, Judge, in careful and well-considered opinions, after tracing the history of the doctrine that a charitable institution is not liable for the torts of its servant, come to the inevitable conclusion that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and can not therefore claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such tort, and they rest the doctrine of non-liability upon the ground that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such tort.

The same distinction is also found in the case of *Kellogg v. Church Charity Foundation*, 203 N. Y., 191, wherein it is held (syllabus 1):

"A charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to purposes of charity."

These views are in harmony with the decision of our own Supreme Court, in the case of *Taylor, Admr., v. The Protestant Hospital Association*, 85 Ohio State, 90, wherein a public charitable hospital was held not liable for injuries to a patient of the hospital resulting from negligence of a nurse employed by it.

It is true that the Supreme Court in that case does not specifically refer to the distinctions pointed out above, but the fact is that in that case there was that same contract relation between the patient and the hospital which resulted in the distinction between liability and non-liability pointed out by the Circuit Court of Appeals, the Court of Appeals of New York and the Supreme Court of Michigan, *supra*.

While there is some doubt as to the application of this distinction to the case of one who, as in the case at bar, was a visitor and whose admission to the cemetery was by and under the right of the relatives of the one interred to enter the cemetery, nevertheless, the decision of the Supreme Court of Massachusetts, in the case of *Donnelly v. Boston Catholic Cemetery Association*, *supra*, in the absence of authority to the contrary, would be conclusive of the case at bar.

However, in examining this subject, we can not overlook the case of *City of Toledo v. Cone*, 41 Ohio State, 149, wherein the Supreme Court held a municipal corporation managing, controlling and regulating a cemetery through the means of a board of cemetery trustees, chosen by the electors of the corporation, under express powers granted by the Legislature, to be liable for the negligence of the superintendent of the cemetery toward one of the cemetery employes while engaged in the work of repairing a vault. It is true that in that case the Supreme Court did not discuss the question of the liability of persons or corporations engaged in works of public charity for the negligence of their servants, but, nevertheless, they held the city of Toledo liable in a case where the negligence occurred in and about work that was being done in a public cemetery. The Supreme Court, at page 165, says:

“The cemetery and vault were a source of benefit and advantage to the corporation, and involved the same responsibility for

1913.]

Wulftange v. Cemetery.

their unsafe and improper management which pecuniary and proprietary interests entail upon natural persons.”

Certainly, if the city, in operating a cemetery, even though it may incidentally receive some pecuniary advantage in the operation thereof, is not engaged in such a work of public charity as to relieve it from liability for the negligent acts of its servants and agents, how can it be claimed that a private corporation, doing precisely the same kind of work, in the same manner, and receiving the same benefits, is a public charity such as is not liable for the negligent acts of agents and servants? While the Supreme Court holds the city liable upon the well known distinction between the exercise of a governmental function and that of a purely private nature, nevertheless, a liability on the part of the municipality in its purely private capacity must rest upon those same rules of law that apply to purely private persons or corporations, and if a purely private corporation would not be liable under the doctrine of *respondeat superior* because of the nature of the work it performs, certainly then the municipality, acting as a private proprietor, would not be liable for these very same reasons. There is no fundamental distinction between the liability of a private owner and the municipality acting as a private owner in the application of the doctrine *respondeat superior*.

The Supreme Court, in *Toledo v. Cone*, say further at page 165:

“The doctrine seems to be well sustained that where a municipal corporation owns property, and for its own benefit derives pecuniary emolument or advantage therefrom in the same way a private owner might, it is liable to the same extent as he would be for the negligent management thereof to the injury of others.”

It thus seems clear that a cemetery corporation is not such a charitable institution as would be exempted from the application of the rule *respondeat superior* for the negligent acts of its agents or servants, and even if there be some doubt as to whether or not it is such a charitable institution, it is still liable for the negligent or tortious acts of its servants toward those persons

who are not the direct beneficiaries of the trust and who therefore have not assumed the risk of such tortious acts.

The demurrer will therefore be sustained.

APPROPRIATION OF LAND FOR PLATFORM PURPOSES ABOUT A DEPOT.

Probate Court of Columbiana County.

THE CLEVELAND & PITTSBURG RAILROAD COMPANY v. LOUISA M.
DEVINE ET AL.

Decided, September 15, 1913.

*Eminent Domain—Railroad Company May Exercise for Depot Platform
When—Probate Court May Determine What Questions on Preliminary
Hearing—Executory Agreement of Settlement, How Enforceable.*

1. A railroad company duly incorporated and having complied with the law granting to it power to appropriate, may under favor of Section 8759, General Code, appropriate land for platform purposes about a depot.
2. Upon the preliminary hearing the probate court may determine the following issues: 1, the existence of the corporation; 2, the right to make the appropriation; 3, inability to agree; 4, necessity for the appropriation, and such collateral questions as may be necessary and incident to the determination of the foregoing issues.
3. Unless an executory agreement of settlement between parties to a civil action is reduced to writing and signed by them, or acted upon, or duly entered as a judgment, it is null and void. Accord resting on mutual promises is not good without performance, and the rule is applicable in an appropriation case.
4. The determination of the question of the necessity for the appropriation rests primarily with the corporation and unless there is a clear abuse of its power, the court, upon the preliminary hearing, will not interfere.

Healea & Kinsey and Lodge Riddle, for plaintiff.
W. F. Lones, contra.

1913.]

Railway v. Devine.

FARR, J.

On the 23d day of November, 1912, the plaintiff company filed a petition in this court for the purpose of appropriating a certain tract of land, belonging to defendant, Louisa M. Devine, and adjoining the lands of plaintiff, in the city of East Liverpool, this county, and as in the petition set out and described. On the day originally fixed for hearing the preliminary questions, the parties met with their attorneys and negotiations were opened looking toward a settlement out of court, which the defendant now contends was fully consummated and which plaintiff denies. The cause was, therefore, by agreement of parties recently called for hearing upon the issues involved. Four questions must be determined by the court upon the preliminary hearing.

First. The existence of the corporation. That is, before a corporation can exercise the right of eminent domain, it must prove its corporate existence, and that it has complied with the law granting to it power to condemn (*Powers v. Railway Co.*, 33 O. S., 429; *Atkinson v. M. & C. Ry. Co.*, 15 O. S., 21). In the case at bar it is conceded that both the corporate existence and power to condemn were satisfactorily shown and the finding is therefore in favor of plaintiff.

Second. The right to make the appropriation. That is, the corporation must show that power to condemn the property sought to be taken has been conferred upon it by some valid legislative enactment (*Powers v. Railway Co.*, 33 O. S., 429; *Harrison v. Incorp. Vtl. of Sabina*, 1 C. C., 52 (1 C. D., 30); *T. E. St. Ry. Co. v. T. C. St. Ry. Co.*, 26 B., 172; *Trumbull v. Shilling*, 53 B., 167). Two sections of the General Code of this state relate especially to said second issue, as follows:

“Sec. 8745. Any railroad company may maintain and operate, or construct, maintain and operate a railroad, with a single or double track, with such side-tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road.

"Sec. 8759. A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad including necessary side-tracks, depots, work-shops, round-houses, and waterstations, material for construction, except timber, a right of way over adjacent lands sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains."

It is urged by counsel for defendants that neither of said sections authorize the appropriation of land for platform purposes about a depot although land for a depot may be appropriated under favor of said Section 8759, and that both of said sections must be strictly construed. If such indeed is the proper construction of said sections, then a railroad company, having appropriated land for a depot and desiring later to meet the demands of advancing business and increasing patronage, would be unable to acquire a single foot of additional territory on which to accommodate the public and conserve its own interests. Such statutes must be strictly construed (*Lewis on Em. Dom.*, Sec. 3; *Cen. Un. Tel. v. Columbus Grove*, 8 C.C.(N.S.), 81; *Rockel*, Sections 1663, 1666), but fairly as well, and not so strictly or technically as to defeat the very object of their creation (*Rockel*, Section 1666; *C. & C. v. Bridge Co.*, 63 O. S., 455). If the foregoing construction be correct, then it is only possible for a railroad company to appropriate land upon which to construct the building known as the depot, because if in the first instance land may be appropriated for the building and platform, and which must be conceded, then why not for a platform later? Mere lapse of time does not alter or change the character of the right, nor can it be defeated because the company has once before appropriated. *Trustees v. O'Meara*, 2 B., 142.

The rule of construction as laid down in 15 Cyc., 588, harmonizes with the weight of authority in this jurisdiction, and reads as follows: "Whatever is essential and indispensable to the construction, maintenance and running of the road, may be taken." *N. Y., etc., R. Co. v. Gunnison*, 1 Hum. (N. Y.), 496; *Summerfield v. Chicago*, 197 Ill., 270 (64 N. E. 490).

1913.]

Railway v. Devine.

In accord with the foregoing it was held in *Ohio Southern R. R. v. Hinkle*, 1 O. N. P., 63, first syllabus, as follows:

“A railroad corporation, in the proper construction of its road bed, having thrown earth, etc., upon a strip of land adjoining its right of way, may appropriate the land so taken, by condemnation proceedings.”

If land may be appropriated on which to deposit waste dirt, is it possible that an appropriation may not be made for platform purposes about a depot if the same be necessary? Scarcely; if such were true, every railroad company in this state would be confronted with the impossible task of operating its lines, without depot platforms. In passing on the above case, *R. R. Co. v. Hinkle*, 1 O. N. P., 63, the court observed at page 66 as follows: “But with us the power conferred is to appropriate so much as may be deemed necessary for its railroad.” “For its railroad” does not mean merely the tracks, but involves more, including such incidentals as are fairly and directly necessary in actual operation (*Geisey v. R. R. Co.*, 7 O. S., 308, 318; *T. & W. R. Co. v. Daniels*, 16 O. S., 390; *Carpenter v. Ohio*, 12 O. S., 457). It is urged in argument that the word “depot” as used in said Section 8759, General Code, should be strictly defined as the building only. In practically every instance the platform, from which passengers, mail and express are loaded and unloaded at a depot, is in some manner attached to or connected with the building itself, just as a porch is connected with and practically a part of a dwelling. It is true that depot platforms are sometimes, perhaps in many instances, made of different material than the building proper, but so are porches and the depot platform like the porch is always connected in some manner with the building proper, and may therefore be likewise fairly considered to be a part of it; the two are practically inseparable.

The question is settled however in this jurisdiction, the word “depot” being defined in *Pittsbery, Ft. W. & C. R. R. Co. v. Rose*, 24 O. S., 219. Day, J., at page 229 observes as follows:

“Clearly, the words, ‘the depot’ mean the entire ground used by the company for its business purposes with the public at that station.”

It was likewise held in *Galveston, H. & S. Ry. Co. v. Thornsberry*, 17 S. W., 521, 523; *United States v. Colwell*, 86 U. S. (19 Wall), 264, 268 (22 L. Ed., 114). In view of the foregoing, it must be held that the plaintiff company has the right to appropriate for platform purposes.

Third. Inability to agree; that is, that the parties have been unable to agree upon the compensation to be paid for the land sought to be appropriated (Section 11039, General Code). The plaintiff alleges that it is unable to agree with the defendant owner as to the compensation to be paid for said land. To plaintiff's petition, said defendant filed an answer averring that on the — day of —, 1913, the day originally set for hearing, the parties to this action met and made an agreement of settlement upon the terms and conditions set out in said answer.

This is denied by the plaintiff company. It is conceded that if there was such an agreement, that it was not reduced to writing and signed by the parties, nor was it entered as a judgment on the record of the court. It is contended by counsel for plaintiff, that the probate court being one of special and limited jurisdiction (Const., Article IV, Section 8; *Davis v. Davis*, 11 O. S., 386; *Sayler v. Simpson*, 45 O. S., 141; *R. R. Co. v. O'Harra*, 48 O. S., 343; *Kinsella v. DeCamp*, 15 C. C., 494; *In re Application*, 14 N. P., 89), has no authority to determine such a collateral question, as made by the answer, that is to determine whether or not such agreement was made and its effect, but that the court has jurisdiction only to determine the four issues, as provided by law as follows: first, the existence of the corporation; second, the right to make appropriation; third, inability to agree; fourth, necessity for the appropriation. It will be observed that the proposition under discussion relates to the third issue. Mr. Woerner in *Woerner on Admin.*, Section 142, states the rule as follows:

"Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given expressly or by implication, the whole proceeding is void; but where jurisdiction is conferred over any subject-matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred the court must of necessity decide such collateral issues."

1913.]

Railway v. Devine.

Since the promulgation of the above, the tendency has been to construe even more liberally and reasonably and substantially widen the jurisdiction of the probate court to meet the exigencies arising in the administration of the duties of said court. The question is determined however in this jurisdiction in the case of *Railroad Co. v. Railroad Co.*, 72 O. S., 385, in which Summers, J., observes as follows:

“ * * * There are many reasons why the court, having original jurisdiction of the appropriation, should have and many why it should not be held not to have authority to determine every question that properly may be determined in such a proceeding.

“Independently of the signification of any of the so-called jurisdictional questions it is not apparent that the jurisdiction of the probate court is limited to a determination of these questions. The fact that the Legislature has seen fit, from considerations of convenience or otherwise, to require the probate judge to determine these questions *in limine* does not necessarily make applicable the maxim *expressio est exclusio alterius*.”

The foregoing unmistakably indicates a tendency to widen the jurisdiction of the probate court and in view of which it must be held that such court has jurisdiction to determine the issue under discussion. It is further urged, however, that if a contract of settlement had been made, as averred in the answer, and it was not reduced to writing, and signed by the parties, acted upon *by* the parties, or entered as a judgment upon the records of the court, that it is null and void.

The earliest adjudication upon this issue in this state, is that of *Frost v. Johnson*, 8 O., 393, the first syllabus of which reads as follows:

“An accord with mutual promises to perform, is not a good defense if there be no performance before action brought. A part performance is not sufficient to bar the pre-existing demand.”

Again it was held in *Dunn v. Life Assn.*, 6 Dec. Rep., 879, 881, that:

“Accord resting on mutual promises is not good without performance.”

A well considered case to the same effect is that of *Bloomer v. Cist*, 4 N. P., 411-416. The most recent case in this jurisdiction is that of *Newburg Brick & Clay Co. v. Chojnicki*, 14 C.C. (N.S.), 599, the first syllabus of which reads as follows:

"It is not error to exclude evidence as to an oral executory agreement of settlement theretofore entered into between the parties." Affirmed without opinion, 83 O. S., 458.

It was likewise so held in case of *Conrad v. Bare*, 8 C.C. (N. S.), 118. A judgment has no validity until entered of record (*Wiley v. Lewis et al*, 4 N. P., 212). The same rule is laid down in *Freeman on Judgments*, Sections 2, 38; 3 O., 553; *Heirs of Ludlow v. Johnson*, 3 O., 577; *Goforth's Lessee v. Langworth*, 4 O., 129; *Newcomb v. Smith*, 5 O., 447. The reason for the principle enunciated in the above authorities is obvious. If it were otherwise, it would mean the abrogation of the primary and well-established rule, that evidence of a compromise can not be offered upon the trial of a cause (*Turnpike v. City of Cincinnati*, 19 C. C., 607; 10 C. D., 288), and litigation would be made to bear many additional burdens of doubt and uncertainty; and the inducement would be offered to still more extravagant plays of the individual imagination, which creates the facts of a case to suit the law. In view of the foregoing it must be held that the averments of the answer do not constitute a defense and the demurrer to the same is sustained. The finding must therefore be that the parties were unable to agree.

Fourth. "The necessity for the appropriation." The plaintiff alleges in its petition that it is necessary in order to carry out the objects and purposes of its incorporation to appropriate the tract of land described, as an addition to the yard of its passenger depot, and as a portion of the depot platform and yard facilities, for loading and unloading passengers, express and mail in said city of East Liverpool and that such appropriation will enable it to more fully perform its duties as a common carrier. The evidence discloses that the land sought to be taken, lies a short distance west of plaintiff's passenger depot in said city of East Liverpool, and immediately adjacent plaintiff's land now used for platform purposes in front of and

1913.]

Railway v. Devine.

about its passenger depot. The evidence further discloses that at and about the point where the appropriation is sought to be made, the plaintiff company loads and unloads a large amount of express, baggage and mail daily; that in so doing it is necessary to use trucks to convey the same which must pass and re-pass said platform. It is further shown that plaintiff's land or platform at this point owing to the proximity of its tracks is too narrow for the use of said trucks when required to pass as above stated and for that reason plaintiff has for some years used for platform purposes the land now sought to be taken, which lies immediately at the rear of defendant's hotel known as the "McKinley" in said city of East Liverpool. The evidence further discloses the amount of land owned by plaintiff company round and about its said depot in said city and the number and length of trains stopping there daily, the approximate average amount of mail, express and baggage loaded and unloaded daily. It is conceded that baggage cars attached to said trains and in which mail, express and baggage is conveyed, usually stand when a train is at said depot, at or near the land sought to be appropriated, and it is not denied that plaintiff's land is too narrow at this point, without shifting its tracks, for the trucks used in hauling said mail, express and baggage to pass and re-pass. The right to determine the question of necessity for the appropriation rests in the first instance with the corporation and if that right be reasonably exercised, it will not be denied. It was so held in *R. R. Co. v. Hinkle*, 1 N. P., 63. The second syllabus reads as follows:

"The power conferred by statute is to appropriate so much as may be deemed necessary for its railroad. The corporation is to determine how much is necessary and unless there is a clear abuse in the attempted exercise of its power the court upon the preliminary hearing will not interfere to determine the matter."

It is likewise held in *R. R. Co. v. R. R. Co.*, 72 O. S., 368, first syllabus:

"While a corporation has primary discretion what land is necessary for the purpose for which it is authorized to make

appropriations, the probate judge has, under the jurisdiction vested in him by Section 6420, Revised Statutes, to hear and determine the question of the right of the corporation to make the appropriation, and the necessity for the appropriation, power to prevent abuse in its exercise, and, if upon such hearing he determines that the appropriation by the corporation will be an abuse of its corporate power, or destructive of the public use to which the land is largely devoted, he may dismiss the petition." * * *

To the same effect it was held in 9 C.C.(N.S.), 405; 10 N.P. (N.S.), 657; *O'Hare v. C., M. & N. R. R. Co.*, 139 Ill., 154; *Teedens et al v. Sanitary District*, 149 Ill., 87; *In re St. Paul & N. P. Ry. Co.*, 34 Minn., 227, 230; *Lewis on Eminent Domain*, Section 393; *Lynch v. Forbes*, 42 Am. St. Rep., 402, 407. It is urged in argument that the plaintiff company could stop its trains in a different place at said depot and by requiring its passengers to travel through its cars, avoid the use of the land in question. Such requirement by the plaintiff company would scarcely be reasonable or practicable, and would subject passengers to unreasonable delay in alighting from trains, as well as inconvenience in passing from one car to another. To unload and unload through the entrance to one or two passenger coaches, the usual number of passengers traveling into and out of a city like East Liverpool would be tedious and unsatisfactory to passengers and company alike, to say nothing of the inconvenience during periods of congested or heavy traffic.

The fact that plaintiff has used said land for some years, with the knowledge and assent of the owner, and for the very purpose for which it is now seeking to appropriate, points strongly toward the necessity for the appropriation and that such necessity was recognized by the parties hereto. Plaintiff company has duly declared the necessity and it does not appear that there is any abuse of its right. It must therefore be held that it is necessary to appropriate the land in question. An entry may be taken in accordance with the foregoing.

1913.]

State v. Brown.

EMBEZZLEMENT BY A CORPORATION.

Common Pleas Court of Hamilton County.

STATE OF OHIO V. CHARLOTTA THOMPSON BROWN.

Decided, October, 1913.

Criminal Law—Conversion of Securities by a Corporation Held to be the Act of Its Controlling Officer.

Where one acting as president and treasurer of a corporation engaged in the brokerage business and shown by the evidence to have been the controlling factor of said corporation, sells the stock of a customer and converts the proceeds to his individual use or the use of the corporation, he will be held to have acted as the agent of said customer, and the intent involved in the wrongful conversion will be regarded as his intent, and an indictment for embezzlement lies against him rather than against the corporation.

Thomas L. Pogue, Prosecuting Attorney, and *Walter M. Locke*, Assistant Prosecuting Attorney, for the state.

Cogan, Williams & Ragland, contra.

CUSHING, J.

At the conclusion of the testimony for the state the defendant, by her counsel, filed a motion praying the court to instruct the jury to return a verdict of not guilty in this case. The motion is as follows:

1. Sufficient evidence has not been introduced by the state to establish beyond a reasonable doubt the material allegations made and set forth in the indictment.
2. There is no testimony to show that the defendant converted to her own use any of the money of the prosecuting witness, Fred Schroth.
3. The testimony introduced does not disclose any agency or contractual relationship between the prosecuting witness, Fred Schroth, and the defendant.
4. Because the testimony discloses that the transaction was only between Fred Schroth and the Thompson Brown Company, a corporation.

I shall consider but two grounds of the motion, viz., the third and fourth, as follows:

3. The testimony introduced does not disclose any agency or contractual relationship between the prosecuting witness, Fred Schroth, and the defendant.

4. Because the testimony discloses that the transaction was only between Fred Schroth and the Thompson Brown Company, a corporation.

For the purpose of this motion, the admitted facts are that the Thompson Brown Company is a corporation; that Charlotta Thompson Brown, the defendant, was at the time in question the president and treasurer of said corporation; that Henry A. Brown, her husband, was vice-president and general manager of said corporation; that prior to March 31, 1913, Henry A. Brown called on Fred Schroth at his place of business in the west end for the purpose of selling him stocks and securities; that on March 31, 1913, Henry A. Brown called Fred Schroth on the telephone and inquired if he, Schroth, knew that J. P. Morgan of New York City had died. Schroth replied in the negative. Brown then stated that in his opinion the death of Mr. Morgan would cause a depreciation in the value of what is known as "steel" stock; that as Schroth owned some 200 shares of said stock, he, Brown, would advise him to sell. Schroth inquired of Brown the price that could be had and Brown answered, 107 $\frac{1}{8}$. Schroth stated that he did not know who to get to sell it, and Brown answered that he would sell the stock for him. Schroth then advised Brown that he would send the stock to him. He gave it to his son, Elmer Schroth, who immediately started to deliver the stock. Elmer took the two hundred shares of said stock to the office of the Thompson Brown Company. On arriving at the office Henry A. Brown and this defendant were there. This defendant took the stock, left the room in which Elmer Schroth was, went into another department of the office and returned and gave the receipt for the steel stock from Fred Schroth and signed by the Thompson Brown Company, by C. T. Brown, president. Elmer Schroth, acting for his father, accepted the receipt and delivered the stock and filed the receipt with his father's papers at their office.

1913.]

State v. Brown.

The further admitted facts are that after Henry A. Brown called Fred Schroth on the telephone as above detailed and before the stock arrived at the office of the Thompson Brown Company, Charlotta Thompson Brown, this defendant and president of the company, went to a branch office of C. I. Hudson & Company in this city and arranged for the sale of the stock at the price agreed upon, 107 $\frac{1}{8}$. Shortly after the receipt of the stock, this defendant drew a draft on C. I. Hudson & Company in New York and attached the stock to it, took the same to the Fourth National Bank of this city and arranged with that bank to collect the draft. At that time she secured an advance on the draft in the sum of fifteen thousand dollars. This advance was made in the form of a cashier's check. The cashier's check was to the order of the Thompson Brown Company, and by this defendant was deposited in the Fifth-Third National Bank of this city to the credit of the Thompson Brown Company; that the draft went forward to C. I. Hudson & Company in New York and by them was paid on or before the fourth day of April, 1913. The Fourth National Bank had sent the draft to its correspondent, the First National Bank of New York. On April 4th, 1913, the First National Bank of New York City wired the Fourth National Bank of this city that the C. I. Hudson & Company draft had been paid, and the sum of \$22,007.77 was credited to the account of the Fourth National Bank of this city. The latter bank immediately notified the Thompson Brown Company through this defendant, when she called at the banking house of said bank, received a cashier's check for \$7,007.77 and deposited the same in the Fifth-Third National Bank as she had done with the fifteen thousand dollars.

Further, on March 31, 1913, this defendant, through Thompson Brown Company began paying out the money so deposited on the obligations of the Thompson Brown Company and her own, and continued from time to time to pay out said money until April 25, 1913, when the last of the money was paid out to creditors of either the Thompson Brown Company or her own, none of it, however, going to Fred Schroth.

After the delivery of the stock as before stated, Fred Schroth on April 4th called this defendant on the telephone and inquired

as to whether or not the money had been received for the stock, she replied that it had not, that the mails were delayed and they "would have to wait on such things."

On April 14th, Mr. Schroth, his son Elmer and Judge O'Hara went to the office of the Thompson Brown Company to inquire as to whether or not the money had been received. They received a reply that it had not been received.

On April 16th, the Thompson Brown Company sent to Fred Schroth a check for \$22,007.77. Immediately after the check was sent, Mrs. Brown, the defendant, went to the office of Judge O'Hara, attorney for Fred Schroth, and stated to him that she had received a draft from New York for the proceeds of the sale of the stock in question; that the draft was not properly endorsed, and that she had instructed her book-keeper to wire to New York for authority to the bank here to endorse the check; that the book-keeper did not obey her instruction, but returned the draft to New York for proper indorsement, and the matter would be delayed and asked Judge O'Hara to have his client, Fred Schroth, hold the check as she did not have enough money in the bank to meet it, and if it were presented it would be embarrassing to her. A day or two after this, Judge O'Hara went with the Schroths to the Fourth National Bank, and there learned that the money had been paid and deposited in the Fifth-Third National Bank. The check was then endorsed to the Fourth National Bank by Fred Schroth, and Mr. Williams, vice-president of the Fourth National Bank presented it to the Fifth-Third Bank for payment, which was refused on account of not having funds.

The motion above stated squarely raises the question as to whether or not the defendant was the agent of Schroth and if she was not, whether the Thompson Brown Company was his agent, and if the Thompson Brown Company was the agent, whether she can be held to answer to this indictment for embezzling the funds of Fred Schroth.

An agent is defined to be one who acts for another by authority from him; and the one who undertakes to transact some business or manage some affair for another by authority, and on account of the latter and to render an account of it.

1913.]

State v. Brown.

There is a difference between an agent and a broker. The agent acts exclusively for some person, while a broker holds himself out generally for employment in matters of trade, commerce and navigation.

The admitted facts in this case are that the Thompson Brown Company, of which Mrs. Brown was the president and treasurer, were in the brokerage business. The receipt for the stock in question was given by the Thompson Brown Company signed by Mrs. Brown and accepted by Fred Schroth as his agent. It seems clear that the Thompson Brown Company undertook to act as a broker for Fred Schroth in the sale of the stock in question.

Counsel for the defendant contends that Mrs. Brown was not the agent in any sense of the word for Fred Schroth. I can not say from the evidence that she personally was specifically authorized to act individually for Fred Schroth. She was the head of the corporation. The corporation undertook to act for him. The business was procured by an officer of the corporation. The money was received by Mrs. Brown and by her deposited in the bank to the credit of the corporation, which, at the time of the deposits was insolvent in more than the sum of \$69,000. Either Mrs. Brown or the corporation or both agreed to undertake to act as agent for Fred Schroth in the sale of this stock. Both Mrs. Brown and the corporation discharged that part of their engagement which related to the sale of the stock and the collection of the money. Whether the corporation pocketed the money or whether Mrs. Brown, acting through the corporation pocketed the money, the fact remains that it was appropriated to a use other than that of the discharge of the obligations to Fred Schroth. Now Mrs. Brown comes in and asserts that there is no valid law to punish her for embezzlement. bezzlement.

In the case of *State of Ohio v. Bennet Carter*, 67th Ohio State, 438, Judge Price, delivering the opinion of the court, uses this language:

"Carter discharged that part of his engagement which relates to the collection of the money and after pocketing the same he asserts that there is no valid law to punish him for embezzlement. Such a defense is brazen, if nothing more."

It is true, a corporation has a legal entity in Ohio. This is apart from the individuals composing it. It is an inanimate being which, left to itself, can do nothing. If a human being or collection of human beings did not cause it to act, it would lie dormant forever. It can neither state a fact nor mis-state the truth. It can not collect money. It is not like the law that is without "name or color or hands or feet; that hears without ears, sees without eyes; moves without feet and seizes without hands." It is what is known as a fiction of law, but when the question of intent is interposed, the law will look beyond the mere fiction of law and assign the intent to the persons that caused the corporation to act.

In the case of *State, ex rel, v. Standard Oil Company*, 49th Ohio State, 137, the Supreme Court says:

"That a corporation is a legal entity, apart from the actual persons who composed it, is a mere fiction introduced for convenience in the transaction of its business, and of those who do business with it; but like every other fiction of law, when urged to an intent and purpose not within its reason and policy, may be disregarded."

In the case of *State of Ohio v. Pohlmyer*, 59 Ohio State, 491, Pohlmyer was indicted by the grand jury of Hamilton county for embezzling \$287 from the W. L. Douglas Shoe Company. Pohlmyer made the defense that the Douglas Shoe Company was not authorized under the laws of Ohio to do business in the state of Ohio, and therefore he could not be held for embezzling funds of that company. The Supreme Court in determining the question thus presented uses this language:

"They do not disclose a purpose on the part of the General Assembly to make booty of the property of a corporation which does not comply with the provisions of the act. Under the statute defining embezzlement the offense consists in converting to one's own use 'anything of value which comes into his possession by virtue of his employment as agent, servant or employe.' The statutory definition of the offense regards the actual relation of the agent, servant or employe, and not the legality of the mode in which it was created nor the extent of the authority conferred. And the rule that one who receives money or any other thing of value in the assumed exercise of

1913.]

State v. Brown.

authority as agent for another, is estopped thereafter to deny such authority, applies in criminal prosecutions as well as in civil actions."

I would not carry the doctrine to an estoppel as far as the Supreme Court has in this case. Indeed, it is not necessary to pass upon that question here, but the particular language of the Supreme Court to which I refer in that case is:

"Under the statute defining embezzlement the offense consists in converting to one's own use 'anything of value which comes into his possession by virtue of his employment as agent, servant or employe.' * * * And the rule that one who receives money or anything of value in the assumed exercise of authority as agent for another."

In this case, both Mrs. Brown and the Thompson Brown Company assumed to exercise authority as agent for Fred Schroth.

Either Mrs. Brown or the corporation acting at her instance received this money and converted it to the use of the corporation or to her individual use. It is my opinion that they are liable as agents of Fred Schroth.

The only remaining question then is whether or not it was the act of the corporation or the act of Mrs. Brown and whether Mrs. Brown can be held in a criminal prosecution for having converted the money of Fred Schroth to her own use.

As I have pointed out, a corporation can not and does not act except at the instance of the individuals controlling it. It was necessary to discuss the law on the question of corporation in discussing the question of agency. I desire, however, to add that the Supreme Court of the State of Wisconsin, in the case of *Milbrath v. State*, 138 Wisconsin, 354, was a case where a corporation had received \$300 from an individual. The money was loaned on a mortgage. The mortgage was afterwards collected by the corporation and the money turned into the treasury of the corporation. The corporation at that time was insolvent and the money was used by the corporation through its president to pay the debts of the corporation and the debts of individual members of the corporation. Milbrath was indicted for embezzlement and made the defense that it was the act

of the corporation, and not his individual act; therefore he could not be held to answer the charge of embezzlement. The language of the court in that case is significant:

"A corporation exists only in contemplation of law, and the legal fiction that it is a separate entity, though necessary for many purposes, can not be urged to an intent and purpose not within the reason and policy of that fiction.

"A person charged with crime will not be heard to say in justification that he has committed the act in his official capacity as officer of the corporation; nor to assert that acts in form, corporate acts, were not his acts merely because they were done by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose."

In the opinion the court uses the following language:

"It will readily be seen that all these errors are assigned on the theory that this corporation intervened between the principal and the lone agent after the relation of principal and agent had been created as an independent responsible personality, which by reason of its intervention to some extent changed the relation therefore existing between the defendant and the Mizer estate, and itself received and converted the three hundred dollars in question.

"No doubt a corporation is for many purposes a juristic person. Corporations have a right to hold and enjoy property, to contract and be contracted with, to sue and to be sued, may in all such matters as an authentional person assert the rights of property, contract, duty or obligation such as actual persons must assert, but we must not forget that a corporation exists only in contemplation of the law. * * *

"The corporation is in such case a mere instrumentality through and by means of which the natural persons in control thereof carried out in their acts."

The conclusion is that Mrs. Brown was the controlling factor in the Thompson Brown corporation; that whatever intent is to be drawn from the evidence was her intent; and that she, and not the corporation, is liable in a criminal prosecution.

1913.]

Ewing v. Ewing.

**INEFFECTIVE EFFORT TO BRING AN ACTION FOR
DIVORCE.**

Common Pleas Court of Greene County.

ELLA EWING v. HENRY EWING.*

Decided, September 22, 1913.

Divorce—Deposit for Costs a Prerequisite to the Filing of a Petition.

Inasmuch as an action for divorce is a purely statutory proceeding, compliance must be had (in the absence of an affidavit of inability so to do) with the provision of Section 11981, as to prepayment of an amount sufficient to cover the costs, and where such payment is omitted at the time of the filing of a paper intended as a petition for divorce, the subsequent making of a deposit for costs does not give validity to said paper, and a motion lies to strike it from the files.

Marcus Shoup, for plaintiff.*T. E. Scroggy*, contra.

KYLE, J.

On the 2d day of July, 1913, Ella Ewing filed her petition for divorce against Henry Ewing. Henry Ewing, by his counsel on July 9th, filed a motion to strike that paper from the files because there had been no deposit for costs made. Upon the next day, the 10th, the plaintiff's attorney deposited with the clerk five dollars, the amount fixed by the clerk.

The claim of the plaintiff is that to sustain this motion would prejudice the plaintiff upon her constitutional right that "all the courts shall be open and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law; and justice administered without denial or delay." Constitution, Article I, Section 16.

The proceedings for divorce are entirely statutory. A man has no constitutional right for divorce. The list of rights which is given under the Constitution does not include the right for divorce. The Legislature had the right to throw around pro-

*Affirmed by the Court of Appeals, October Term, 1913.

ceedings for divorce any such limitations or conditions as they saw fit, and one of them was:

"Section 11981. No clerk of a court of common pleas shall receive or file a petition for divorce or alimony until the party named as plaintiff therein, or some one on his or her behalf, makes prepayment of deposit with the clerk of such an amount as will cover the costs likely to accrue in the action exclusive of attorney fee, or gives such security for the costs as in the judgment of the clerk is satisfactory; but when a plaintiff makes affidavit of inability either to prepay or give security for costs, the clerk shall receive and file the petition. Such affidavit shall be filed with it, and treated as are similar papers in such cases."

The clerk had no authority to receive or file that petition without a compliance with Section 11981. It was an unauthorized act. His act could have no validity or effect in law. No action was commenced by the filing and docketing of the plaintiff's petition. The paper filed without the deposit of the costs did not become a legitimate pleading. *Moorman v. Schmidt*, 69 O. S., 337.

What effect did the payment of that five dollars, or the costs, one week later have?

It could not operate to vitalize that petition because that must precede the filing of the petition. He can not receive it until the plaintiff deposits the amount as fixed by law. Until that is done there can be no action commenced. If there had been no action commenced such payment could not have the effect of vitalizing the case, because the summons had issued on a paper before this time that was not a petition in law.

The act of the clerk in filing the petition without a deposit or security for costs, as provided by Section 11980, was unauthorized and void. *Sebeirt v. Switzer*, 35 O. S., page 665.

Therefore, my opinion is that this motion should be sustained and the paper—because it is not a petition under the divorce proceedings—should be stricken from the files. An order may be taken accordingly.

1913.]

Oberhelman v. Allen.

OWNERSHIP OF GROUND IN VACATED STREET.

Common Pleas Court of Hamilton County.

JOHN A. OBERHELMAN v. AMELIA E. ALLEN.

Decided, June 11, 1913.

*Municipal Corporations—Vacation of Streets—To Whom Title Reverts,
Where the Land Was All Dedicated by the Property Owners on
One Side.*

Upon the vacation of a public street by the city council, the whole of which street was dedicated out of the property of the grantors of the abutting property holders on the west side, the abutting property holders on the east side, whose grantors contributed no property to the original dedication, are entitled to an easement only in the vacated street. The fee of such vacated street subject to such easement is in the abutting property holders who are the grantees of the original grantor who dedicated the street.

*Herman P. Goebel and O. M. Dock, for plaintiff.
Stanley Matthews and Smith Hickenlooper, contra.*

MAX, J.

William Terry and Robert Goudy were the original owners of the land, the subject of this action. On May 25, 1829, while Robert Goudy owned this land, according to the records of Delhi township, a township road was laid out from the farm of Thomas Habard to the Rapid Run pike, now known as St. Lawrence avenue. These records show that the road was thirty feet wide and that the township trustees by proper proceedings assessed damages in favor of Robert Goudy at \$35, and that Robert Goudy agreed to receive the damages and open the road when the money was paid. The road was afterward opened.

The Goudy property by subsequent conveyances is now vested in Amelia E. Allen and the Hickenloopers. In 1841, Terry conveyed his property, which now comprises the plaintiff's subdivision, describing the line between the property conveyed and the line of Robert Goudy, as follows:

"Beginning at a stake in the east side of Township road and in the east of Robert Goudy's line, thence north with the road and Goudy's line, 11 chains and 55 links to a stake and where the road turns east, thence south 66 degrees 11 minutes," etc.

In 1896 Anne E. Moore quit-claimed all her interest to A. Hickenlooper in the Goudy property, describing it as follows:

"Beginning at a point on the south side of St. Lawrence avenue 502.13 feet west of the point, where the south line of St. Lawrence avenue and the west line of Hazard road meet, thence north 73 degrees, 17 minutes east 503.13 feet along the south line of St. Lawrence avenue to the west line of Hazard road, thence S. 2 degrees 42 minutes west and along Hazard road 972.97 feet to a point, thence south 67 degrees 5 minutes west 512.565 feet to a point, thence west 2 degrees 4 minutes east 1029.73 feet to the place of beginning."

On September 4, 1906, the Hickenloopers petitioned the city council to vacate Hazard road, Price Hill, in the following words, to-wit:

"The undersigned owners of lots in the city of Cincinnati, abutting upon and in the immediate vicinity of the thirty foot way known as Hazard road (sometimes improperly called Lincoln avenue); extending from St. Lawrence avenue, to West Eighth street, west of Enright avenue, respectfully petition your honorable body, that said Hazard road may be vacated between the points named, for the reason that it is no longer of use to the public and its vacation will not be detrimental to the general public interests."

And on October 29, 1906, council vacated Hazard road. The Hickenloopers afterward conveyed to the defendant, Amelia Allen, the property which included the thirty feet of the vacated Hazard road, and the Allens fenced this in.

The plaintiff contends that upon the vacation of the street, as an abutting property owner, he was entitled to one-half of the fee in said vacated street, and asks to have his title quieted as to the defendant's claim to the ownership of the entire vacated street. And by amendment to the petition asks for an injunction against the defendant interfering with his easement of egress and ingress along said vacated portion of the street.

1913.]

Oberhelman v. Allen.

The defendant by her answer and cross-petition claims the fee to the entire vacated street and asks to have her title quieted as to the plaintiff's claim to the fee of one-half of the vacated portion of the street. The defendant insists that there is no evidence of a statutory vacation of Hazard road, for the reason that the property was located in Storrs not Delhi township, and that the act of laying out of the road in Delhi township was not a proper dedication. Of course whatever took place in Delhi township can not be binding in law in Storrs township, but the records show an intention on the part of Robert Goudy to dedicate this township road.

At the hearing the undisputed evidence was that for nearly forty years Hazard road was a known road between St. Lawrence road and Hazard farm; that during the past twenty-five years it has intersected with Eighth street and that the road was always open to the public; that it was fenced off on each side; that it has been known for the past fifteen years as Lincoln avenue; that the city had put up a sign painted with the name of Lincoln avenue on it; that the public continuously used this road and drove over it, though during the past few years the road could not be used for driving on account of the wash-out. A policeman testified that in the guide furnished policeman the road was known as Lincoln avenue.

Assuming that there was no statutory dedication, I am of the opinion that there was a common law dedication. There certainly was an intention on the part of Robert Goudy to dedicate the road to public use. This is shown by the record in Delhi township, coupled with the fact that the road was laid out and was in existence and was recognized by conveyances in the chain of title.

Defendant contends under the decision of the Supreme Court in *Railroad Company v. The Village of Roseville*, 76 Ohio St., 108, where the court at page 115, says, "it is well settled that in order to deprive the owner of his property by the common law dedication it must clearly appear not only that he intended to and did give it to the public, but also that the gift was accepted," that there could be no common law dedication without an acceptance.

There is no doubt but that this is the law of this state, but the facts in this case show that there was an acceptance. There need not be an actual acceptance on the part of the city, an implied acceptance is sufficient.

Elliott on Roads and Streets, 3d Edition, Section 167, says:

“An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of the highway, and treating it as one of the public ways of the locality.”

The putting up of a sign by the city naming the street the printing of the name of the street in the manual for policemen on their beat, are sufficient evidence of acceptance on the part of the authorities (*City of Louisville v. Snow, Admr.*, 107 Ky., 536). But aside from this, the defendant is estopped from denying that there was a common law dedication in this case. Whatever title she has to this vacated road is by virtue of the vacation.

In the ninth paragraph of the stipulation it appears that the defendant's grantors, the Hickenloopers, petitioned council to vacate the road in question. This certainly recognizes the road as a public street and the defendant can not now raise the question that there never was an acceptance on the part of the city.

Defendant contends, however, that because the road was originally carved out of the property by her grantor, that upon vacation the entire fee vests in her and other abutting owners claiming through the same original owner free from any encumbrance.

The cases of *Scery v. Waterbury*, 82 Conn., 567; *Watrous v. Southworth*, 5 Conn., 505; at 510; *In re Roberts*, 34 Minn., 99, support this contention.

There is no decision in Ohio bearing directly upon this question. All the cases in this state are to the effect that where a street is vacated, the public no longer owns it and that it must either revert to the original owner or adhere to the abutting lots as by discretion, and that as the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street when vacated, restored to him.

1913.]

Oberhelman v. Allen.

While, therefore, it is still an open question in this state as to whether an abutting property owner, whose grantor contributed nothing to the making of the street, is entitled to a fee in one-half upon vacation, there can be no doubt whatsoever, that such abutting property holders, and the plaintiff is such in this case, is entitled to an easement in such vacated street for the necessary ingress and egress. *Traction Co. v. Parish*, 67 Ohio St., 181, 190, 191.

To the same effect are *Manufacturing Co. v. Beatty*, 65 Ohio St., 264; *Kerr v. Commissioners*, 51 Ohio St., 593, citing with approval *Stevens v. Shannon*, 6 O. C. C., 142; *Railway Co. v. Lersch*, 58 Ohio St., 651; *Callen v. Electric Light Co.*, 66 Ohio St., 166.

That an abutting property owner is entitled to an easement in a vacated street although his grantor contributed no property to the original street, has been expressly held by our own circuit court in 7 C.C.(N.S.), 468; affirming Judge Pfleger in the same case as reported in 2 N.P.(N.S.), 293. The court said:

"We are of opinion that when Kirby alley was accepted by the city of Cincinnati under the amended dedication it became and was a public way, and the premises occupied by the Oliver Schlemmer Company abutting on it became invested with an appurtenant easement in the same, which was not and could not be destroyed by the proceedings for a public vacation. * * * This being so, the proposed wall which the defendant admits it purposes to build is such a trespass upon the private property rights of plaintiff as to entitle plaintiff to an injunction without compelling him to submit and bring his action at law for damages."

This is also the rule in New York. In *Holloway v. Southmayd*, 139 N. Y., 390, the court says, at page 402:

"In this and like cases, while the grantor may have retained the fee of the soil in the highway, he has but a naked, or barren title, and, that, in the event of the discontinuance of the public highway by act of law, the grantee, and his successors in interest, nevertheless, will still be entitled to the perpetual enjoyment of certain easements, which were impliedly granted, in relation to the open way lying in front of the lands granted, and referred

to as a boundary. This view is in accord with authority and with reason. That private easements may be appurtenant to the property abutting upon a public highway must be conceded. These easements of the abutting landowner are in addition to such as he possesses as one of the public, to whose use the property has been subjected. They are independent of the public easement and, whether arising through express or implied grant, are indestructible in their nature, by the acts of the public authorities, or of the grantor of the premises, as is the estate, which is the subject of the grant."

Defendant contends, however, that under the authority of *Manufacturing Company v. Beatty*, 65 Ohio St., 264, that because the plaintiff's lots front on Oakland avenue and not on Hazard street, the vacated road, that there is no easement. The Beatty case is easily distinguishable from the case at bar. There, the property owner had access to his property without going over the vacated street. In the case at bar, the only access to the rear of the property which abutted on the vacated road is along said road, and the plaintiff is entitled to an easement of egress and ingress along this vacated road.

The defendant's cross-petition to quiet title against the plaintiff's claim will be allowed, subject of course, as to his right to an easement as hereinbefore indicated.

A decree may be prepared in accordance with this opinion.

1913.]

Elliott v. Shaw.

DISTRIBUTION AMONG OTHER THAN LINEAL DESCENDANTS.

Common Pleas Court of Medina County.

LEE ELLIOTT, ADMINISTRATOR, v. DANIEL SHAW ET AL.

Decided, July 16, 1913.

Inheritance Passing to Nephews and Nieces and Children of Deceased Nephews and Nieces—How They Take under the Ohio Law.

1. A testator who provides, "all the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the residue of his estate shall be distributed the same as the property of an intestate would be distributed.
2. Where such testator left surviving him two nephews and one niece and children of two other nieces, the residue of his estate will be divided in five parts of which the two nephews and the niece will each get one-fifth, and each set of children of the deceased nieces one-fifth to be equally divided among them.

Lee Elliott and Frank Heath, counsel.

DOYLE, J.

The plaintiff asks the order and direction of the court as to the manner of distributing the residue of the personal estate of James C. Johnson, deceased, of whose estate plaintiff is administrator with the will annexed.

The third item of the will provides: "All the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio."

Johnson left no wife nor lineal descendants. He had had a brother and sister, both of whom were deceased leaving issue. The brother left two children living, a son and a daughter, and two grandchildren who are the issue of a deceased daughter, and the sister left one son living and two grandchildren who are the issue of her deceased daughter.

These three nephews and nieces and four children of the other two nieces are under the laws of inheritance of Ohio entitled to the residue of the estate of the testator, under the item of

his will. The sole question presented is in what proportion do they share in the residue.

By statute law of Ohio (Sections 8578 and 8584), the personal property of an intestate is divided in the manner provided for dividing real estate as provided in Sections 8574, 8581, 8582 and 8583.

Paragraph 3 of Section 8574 provides:

“If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.”

The decedent Johnson is not an intestate, but his intention, which is the sole guide in the construction of his will, was that the residue of his estate should be distributed according to the laws of inheritance of the state of Ohio. An inheritance is the right to succeed to the estate of a person who dies intestate. Hence, there being nothing before the court to show the testator's intention but this third item of his will, the court is, by his direction, constrained to treat the residue of his estate, so far as the manner of its distribution is concerned, as though it were the personal estate of an intestate.

The provisions of the statute in this case, as to collateral heirs, follow the statutory provisions providing for lineal descendants. Section 8582, General Code, provides:

“If some of the children of such intestate are living and others are dead, the estate shall descend to the children who are living, and to the legal representatives of such as are dead, so that each child of the intestate who is living will inherit the share to which he or she would have been entitled, if all the children of the intestate were living, and the living representatives of the deceased child or children of the intestate inherit equal parts of that portion of the estate to which such deceased child or children would be entitled, if such deceased child or children were living.”

The next section (8583, General Code,) then provides for the contingency presented in this case. It reads as follows:

“The provisions of the next preceding section shall apply in all cases in which the descendants of the intestate, entitled to

1913.]

Elliott v. Shaw.

share in the estate, are of an equal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity will take the share to which he or she would have been entitled, and all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living."

Here we have persons entitled, under the inheritance laws of Ohio, to property who are of unequal relation by consanguinity to the ancestor. Section 8581, General Code, provides:

"When all the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren or great grandchildren, or of a more remote degree of consanguinity to such intestate, the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be."

The persons in this case who are of equal degree of consanguinity to the testator are the nephews and nieces and they will, under the laws of inheritance, take the share to which each would have been entitled if all the nephews and nieces had been living.

There were five nephews and nieces, hence each nephew and niece would take one-fifth of the residue.

The children of the deceased nieces will take by representation, that is, each set will take what would have come to their parent had she been living, which share they shall enjoy equally, following the provisions of Section 8582 as provided for in section 8583.

In *Parsons v. Parsons*, 52 O. S., 470, the Supreme Court interpreted R. S. 4166, which is now General Code, Section 8582, as providing for grandchildren taking by representation where there were children living. (See p. 484.)

This case approves *Dutoit v. Doyle*, 16 O. S., 400, the syllabus of which is as follows:

"The seventh section of the act regulating descents, passed March 14, 1853, did not change the rule (which has always prevailed in Ohio) that in case of a descent cast upon children,

where some of the children were living and others dead leaving issue, the share to which each of the deceased children would, if living, have been entitled, should descend to the issue or legal representatives of each respectively."

Section 7 of March 14, 1853, was re-enacted into 4166 (G. C., 8582) without substantial change and introduces the principle of representation.

This Section 7 was part of Section 10 of the act of February 24, 1831, and follows the rule of descent provided successively by acts of February 22, 1805, December 30, 1815, and February 11, 1824.

The act of 1853 did not change the rule of descent. Hence, following Section 8583, which provides that "In all cases in which the descendants of the intestate, entitled to share in the estate, are of an unequal degree of consanguinity to the intestate, those who are of the nearest degree of consanguinity will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living, "the plaintiff together with the niece and the other nephew would each be entitled to one-fifth.

Then pursuant to Section 8583 we must look to Section 8582 to find the portion to which each of the grand nephews and nieces are entitled which, as shown above, apportions to each set the portion their parents would have been entitled if living. Each of the grandnephews and nieces in this case get one-tenth.

In the case of *Ewers v. Follin*, 9 O. S., 326, the Supreme Court construed Section 10 of the act of February, 1831, which provides for a distribution similar to that provided in Section 8582. It was there held that "when an estate descended to nephews and nieces, legal representatives of brothers and sisters, no brother nor sister of the intestate surviving, the nephews and nieces took *per capita*; and if a nephew or niece had died before the intestate, leaving children, such children took *per stirpes* the share of the deceased parent."

In a recent case in the circuit court of the fifth circuit, *Goff v. Disbennet*, 33 C. C., 234, it was held that, "Title to

1913.]

Faber v. Hageman.

property acquired by purchase, upon death of the owner intestate, with no heirs except nephews and nieces, is cast by General Code, 8574, upon such nephews and nieces as a class, and they take under General Code, 8581, *per capita* and not *per stirpes*."

A decree for distribution in the manner indicated herein may be entered.

EMBODYING IN PETITION COPY OF INSTRUMENT SUED ON.

Common Pleas Court of Lorain County.

LENORA FABER v. A. V. HAGEMAN.

Decided, 1913.

Pleading—Setting Out in Haec Verba the Instrument Upon Which Claim is Made—Sections 11333, 11334 and 11305.

In an action for recovery of the amount due on a promissory note, a motion does not lie to strike from the petition the written guaranty by the defendant of payment of the note forming the basis of the claim.

H. A. Pounds, for plaintiff.

W. B. Thompson, contra.

STROUP, J.

The plaintiff in her petition says that on the 31st day of November, 1906, she loaned to Charles E. Mudge and E. T. Mudge the sum of \$3,000, and that said parties executed and delivered to her a promissory note for such sum, due and payable on or before one year after date; that the loan was made at the instance and request of defendant, and that as an inducement and consideration for making said loan the defendant entered into an agreement in writing with plaintiff by the terms of which said agreement the defendant guaranteed to the plaintiff the payment of said note and the amount thereof when due. The petition then recites *verbatim* the instrument, which is as follows:

"LORAIN, O., Nov. 3rd, 1906.

"LENORA FABER, Elyria, O.

"*Dear Madam:* I hereby agree to see that note dated today given by Chas. E. Mudge and E. T. Mudge of three thousand dollars, due on or before one year after date, is paid when due, it being understood that you are to advise me at least thirty days before said note is due.

"Very truly, A. V. HAGEMAN."

Plaintiff further states in her petition that she advised and notified the defendant at least thirty days before said note was due, in accordance with the terms of said agreement, and that no part of said note or said sum of \$3,000 has been paid, and that defendant has wholly failed and refused to pay the same or any part thereof; that there is now due on said note the sum of \$3,270, for which plaintiff claims judgment against defendant.

To this petition the defendant has filed a motion asking for an order to strike out of said petition the instrument set out therein.

It is urged by the defendant in support of his motion that there is no authority for setting out *in haec verba* an instrument such as is set forth in the petition, and especially is this so in view of the recent case found in 82 O. S., 240.

It becomes necessary for the court in passing upon this question to consider General Code, Section 11333 and Section 11334, formerly Sections 5085 and 5086, Revised Statutes, and originally Sections 117 and 122 of the old code, as well as Section 11305, General Code, formerly Section 5057 of the Revised Statutes.

Much difficulty had arisen in the application of and the construction to be placed upon these sections of the statute, and while it may seem somewhat academic to review these sections it is necessary, I deem it, to do so in order to properly dispose of the question presented.

General Code, Section 11333, reads as follows:

"When the action, counter-claim or set-off is founded on an account, or on a written instrument as evidence of indebtedness,

1913.]

Faber v. Hageman.

a copy thereof must be attached to and filed with the pleading. If not so attached and filed the reason for the omission must be stated in the pleading.”

It will be seen that this section refers to an instrument as evidence of indebtedness, and when an action, counter-claim or set-off is founded on such an instrument, there is no other alternative than that a copy of the instrument must be attached to and filed with the pleading, and if it is not so attached the reason for the omission must be stated. It will be borne in mind that this statute does not say that the instrument as evidence of indebtedness shall be attached to and made a part of the pleading, but merely attached to and filed with the pleading, and it also should be borne in mind that the language is imperative that it *must* be attached to and filed with the pleading.

The next section, General Code, Section 11334, reads as follows:

“In an action, counter-claim or set-off founded upon an account or upon an instrument for the unconditional payment of money only, it shall be sufficient for the party to set forth a copy of the account or instrument, with all credits and the endorsements thereon, and to state that there is due to him on such account or instrument from the adverse party a specified sum which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, the facts which fix their liability also must be stated.”

The construction placed upon these sections by Judge Swan in Pleading and Precedents, is most instructive and is treated in a masterful manner. His work was written when the original code was in its infancy. It is interesting to note that after the enactment of the original code it was decided by some of the courts that when an action was brought on an instrument for the unconditional payment of money only, the pleader if he saw fit to embody in the pleading a copy of the instrument, such as a note, must also attach a copy to the petition, as provided by Section 11333 of the General Code, but this author says that such is not the case, and in construing both sections together it would be a useless practice.

It is also interesting to note that when an action, counter-claim or set-off is founded on an account or upon an instrument for the unconditional payment of money only the section does not make it imperative to put into the pleading a copy of the note, but it merely says that it shall be sufficient for the party to set forth a copy of the account or instrument. The practice now generally followed is to incorporate into the pleading the instrument, although it is permissible to attach a copy to the pleading, and if it is so attached it is not necessary to say that such copy is a part of the pleading, as Judge Swan says that it becomes a part of the pleading by force of the statute. This, it will be borne in mind, has reference only to instruments for the unconditional payment of money only.

In the case at bar the instrument sued on is not one for the unconditional payment of money only, but at most is an evidence of indebtedness such as is referred to in Section 11333, General Code. That section, as I have stated, merely states that a copy of such instrument must be attached to and filed with the pleading, but at this point it is necessary to refer to the other section above referred to but not quoted, namely, Section 11305, General Code, a part of which reads as follows:

“The first pleading shall be the petition by the plaintiff, which must contain: First, a statement of facts stating a cause of action in ordinary and concise language.”

As I have said, it is urged by the defendant that since this instrument is not for the unconditional payment of money only, and not falling within the meaning of Section 11334, General Code, as being an instrument for the unconditional payment of money only, a copy thereof must be attached to and filed with the pleading. In this connection Judge Swan, in his work, at page 197, has this to say, which is decisive of the question presented:

“The whole question, then, in regard to setting forth in the pleading a copy of the instrument upon which the action, counter-claim, or set-off is founded, except as to accounts, notes, bills and other instruments, for the unconditional payment of

1913.]

Faber v. Hageman.

money only, is left to be determined by the courts, under the general rules of pleading prescribed by the code. It was proper that it should be so; for, in many cases, there is no more concise and precise mode of stating a cause of action or defense in pleading, than averring the execution of an instrument and setting it out; then averring that the party pleading 'duly performed all the conditions therein contained on his part,' and assigning breaches. Pleading thus made up, in many cases, conforms entirely to the rules of conciseness, definiteness and relevancy, prescribed by the code."

The author then goes on to say that there is then a very obvious limit to this mode of pleading, as in cases where there is embodied in the instrument language which is not relevant or pertinent to the controversy, as where it would unduly encumber the pleading and increase the costs or obscure the precise nature of the charge or defense. The author says that if the action is founded upon a judgment it will be improper to copy the record into the pleading; so in an action for rent arising upon a lease, containing various stipulations as to repairs, etc.; in these and like cases if the party copied these instructions into the pleading or made them part of the pleading by allegation, the court, on motion, would order the copy to be stricken out, and thus compel an amendment. And he goes on to say that although in certain cases the language of the instrument may be relevant, it is not good pleading to copy the instrument into the pleading, such as in an action upon a covenant of warranty, the attestation and acknowledgment and the granting part of a deed may not be irrelevant matters of allegation, but this would not justify copying the whole deed and acknowledgment into a petition.

Kinhead, in his work on Code Pleading, 2d Edition, Section 57, in referring to the dissertation of Judge Swan in his work, has this to say:

"Despite the fact that a distinguished jurist and author, while the code was in its infancy, placed a construction on Section 5085-6 of the code relating to attaching and pleading copies of written instruments which has not since been made clearer by any court or writer, there is at this time considerable confusion, diversity of practice and lack of understanding as to these two provisions."

Then this author attempts to throw further light upon the subject as may be derived from the practice and experience of the bar and adjudications in those states which have adopted the same provisions. It suffices to say that he adopts the construction placed upon the sections by Judge Swan.

In the case of *Crawford et al v. Satterfield*, 27 O. S., 21, the Supreme Court of this state held that "in actions founded upon written agreements, other than for the unconditional payment of money only, it is not good pleading to copy the written instrument into the pleading, nor to attach a copy making it a part thereof." It will be noticed that the court did not say it was not good practice to attach a copy, but that it was not good practice to attach a copy making it a part of the pleading. This is entirely in accord with Judge Swan's construction, and the Supreme Court refers with approval to Sections 198 and 199 of Swan's Pleading and Precedents.

But, as I have said, counsel for the defendant urges that the Supreme Court of this state in *State v. Collins*, 82 O. S., 240, has changed the established rule, but such is not the case, and a careful reading of the whole case will show that the Supreme Court did not intend the decision to apply generally to the subject of attaching of instruments to pleadings, but should be confined to the facts of that particular case. Judge Shauck in that case uses these words, which are claimed by the attorney for the defendant to bear out his contention:

"These instruments, not being for the unconditional payment of money, nor evidence of indebtedness existing at the time of their execution, are not within the provisions of Sections 5085 or 5086, Revised Statutes."

It is urged in the case at bar that the Supreme Court meant to say that instruments such as is sued upon in this case are not evidence of indebtedness existing at the time of their execution. That case was an action upon the official bond of a county commissioner to recover indemnity to the county on account of damages which it had been compelled to pay for injuries to persons and property resulting from negligence of the board of county

1913.]

Faber v. Hageman.

commissioners in maintaining a highway. A reading of the case will show that at the time the bond was given counties were not liable on account of the negligence of the commissioners, but that Section 845, Revised Statutes, as amended April 13, 1894, imposed a limited liability on such boards. The bond was given prior to the amendment and Judge Shauck says that at the time of the execution of the bond it was not an evidence of indebtedness, as such liability could not be read into the bond after the same had been executed. That sufficiently explains what the court meant by the language I have quoted. In that case the petition embodied the bond of the commissioner. This was poor pleading and the court, as I have said, had the particular facts of that case in view when the decision was rendered, and certainly the Supreme Court did not intend to have its language applied generally to instruments as evidence of indebtedness or as changing the time-honored practice.

In this case, if the instrument were not embodied in the petition the substance of it would have to be alleged and a copy attached, and Judge Swan, as I have said, endorses and commends the practice, where the language is all relevant to the controversy, to embody the instrument in the pleading, as he says that it is in harmony with the statute which provides that the cause of action shall be stated in ordinary and concise language. Certainly no prejudice can result to the defendant, and I hold that the petition is good pleading.

The motion to strike the instrument from the petition will be overruled, and an exception noted.

WORK HOURS FOR FEMALE EMPLOYEES IN A CANDY FACTORY.

Common Pleas Court of Hamilton County.

REINHART & NEWTON CO. V. STATE OF OHIO.

Decided, April, 1913.

Appearance—Criminal Law—Work and Labor—Service on Corporations in Criminal Proceedings—Employment of Females in Candy Factories—Sections 1008 and 13607.

1. The inhibition of General Code, 1008, against the employment of females over eighteen years of age more than ten hours a day or fifty-four hours a week, except in canneries or establishments engaged in the preparation for use of perishable goods, applies to candy factories.
2. In candy factories there can be no work performed overtime except to prevent the goods from perishing. The fact that goods could not be prepared in summer so that the factory was compelled to work overtime in the fall to prepare goods for the holiday trade is no defense.
3. In a criminal or *quasi* criminal proceeding the only way service can be obtained upon a corporation is by issuing and serving a summons on one of its officers as provided in cases of indictment. General Code, 13607.
4. If the president of the corporation is arrested on a complaint against a corporation for violation of a penal statute, and if the corporation thereafter files a motion to quash on grounds other than that of lack of jurisdiction of the person, this is a voluntary appearance of the corporation and the justice has jurisdiction. A motion to quash because the justice has no jurisdiction of the person of the defendant and of the subject-matter is an appearance, though the defendant states it appears solely for the purpose of the motion.

Charles B. Wilby, for plaintiff.

John A. Deasy, contra.

MAY, J.

This is a proceeding in error to reverse a judgment rendered by the magistrate finding the defendant corporation guilty of violating provisions of General Code, Section 1008, prohibiting every person, partnership or corporation from employing females over eighteen years of age more than ten hours a day.

1913.]

Reinhart & Newton Co. v. State.

The defendant seeks a reversal of the judgment on two grounds:

First, that the magistrate had no jurisdiction of the person of the defendant and the subject-matter of the action; and second, that the defendant being engaged in the preparation for use of perishable goods was within the exception of General Code, Section 1008, which reads:

“Provided, however, that no restrictions as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods.”

The contention that the magistrate did not have jurisdiction of the person of the defendant is based upon the fact that no summons was issued to bring the defendant corporation into court.

From the transcript and original papers in the case, it appears that an affidavit charging a violation of the statute was filed with the justice on October 4, 1912, and on October 10, 1912, the justice issued a warrant to the constable commanding him “to take the said Reinhart & Newton Company, a corporation, by one of its officers, if he be found in your county * * * and him take and safely keep so that you have his body forthwith before me,” etc. The return on the warrant is as follows:

“October 11, 1912, I have the body of the within named J. D. Reinhart now in court. Edward Wise, Constable.”

The defendant, appearing for the purpose of its motion only, and not entering its appearance generally, filed a motion to quash the information because of defects apparent upon the face of the record in this, to-wit:

1. Because the court lacked jurisdiction of the person of the defendant and of the subject-matter of the action; and,
2. Because of the lack of definiteness and certainty in the election of the offense in that it does not allege in what hours more than ten hours on the day named in the information, the said Ida Kennedy worked in the factory of the defendant.

Upon the overruling of the motion; the defendant, appearing solely for the purpose of demurrer, demurred, (1) because the facts do not constitute an offense against the laws of the

state of Ohio; and (2) because the court is without jurisdiction of the person and the subject-matter of this action.

The demurrer was likewise overruled.

The plaintiff in error, the defendant below, now contends that the magistrate erred in assuming jurisdiction over the person of the defendant. The state claims that by filing the demurrer, under Section 13625, General Code, the defendant below entered its appearance.

If the defendant below had saved its rights by its motion to quash, it would not have waived any rights by demurring to the petition.

In Ohio there is no statutory authority for the arrest of a corporation. Neither is there any provision for serving a warrant on an officer of a corporation against which a complaint is lodged before a magistrate. When an indictment is returned against a corporation under Section 13607, General Code, a summons commanding the sheriff to notify the accused shall issue, and such summons, with a copy of the indictment, shall be served and returned in the manner provided for service of summons upon such corporation in civil actions.

Although in this case there was no indictment, still, by analogy, if a summons had been issued and served on the president, the service would have been good.

But, in my opinion, the defendant below waived its rights by voluntarily entering its appearance in this case by its motion to quash, which, although stated on its face that the defendant in making the motion appeared solely for the purpose of filing the motion and questioned the jurisdiction of the court, still, the motion went further and by alleging that the court did not have jurisdiction over the subject-matter of the action and also that the affidavit lacked definiteness and certainty in the election of the offense, went into the merits of the case.

Elliott v. Lawhead, 43 Ohio St., 171, holds that where a motion also asks to have a case dismissed on the ground that the court has no jurisdiction over the subject-matter of the action, which motion is not well founded, it is a voluntary appearance which is equivalent to a service of summons.

The motion in this case was very much like the motion in the case at bar. It contained two points: (1) to strike the case

1913.]

Reinhart & Newton Co. v. State.

from the docket and the petition from the files for want of legal and proper service; and (2) because said court had no jurisdiction of the subject-matter of said action or debt.

In *Blinn v. Rickett*, 6 C.C.(N.S.), 513, it is held:

“Whenever the defendant asks the court to pass upon any question connected with the merits of the case, that moment he submits himself to the jurisdiction of the court.”

In *Smith v. Hoover*, 39 Ohio St., 249, Judge McIlvaine, in laying down the proposition that a defendant has the right to appear by motion for the purpose of raising the question of jurisdiction and that such motion is not an appearance in the case. says at page 257:

“In respect to this question, an important distinction is made between an objection to the jurisdiction of the subject-matter of the suit, and of the person of defendant, although complete jurisdiction in the court to hear and determine the action is not acquired unless the court has jurisdiction over both the subject-matter and the person. An objection to jurisdiction over the subject-matter is a waiver of objection to the jurisdiction of the person, while an objection to the jurisdiction of the person is a waiver of nothing.”

See also *Long v. Newhouse*, 57 Ohio St., 348.

Under the authorities, therefore, the defendant below, by filing its motion although it stated on its face that it was filed merely for the purpose of the motion alone, raising questions other than those of jurisdiction, waived its rights and entered its appearance.

The second ground upon which the defendant seeks a reversal of the judgment is not well taken.

The defendant contends that it is within the exception of the statute, “provided, however, that no restrictions as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods.”

The record shows the defendant is engaged in the manufacturing of candies. Candies, of course, are perishable goods. But the testimony further shows that at the time of the violation of the statute, to-wit, September 23, 1912, the defendants’ employees were working overtime not to prepare for use perishable

goods which otherwise would have been destroyed but to prepare goods for the Thanksgiving and Christmas trade.

The defendant's claim is that because it could not manufacture candies during the summer months for the fall trade, such goods being perishable if made in summer, therefore it could employ female labor overtime in the fall because the purpose of the exception was to favor establishments that have a short season.

This construction is untenable. The language of the statute is clear and applies only to such establishments engaged in preparing for use perishable goods. As the goods in this case, *i. e.*, candies, were not perishable at the time of their preparation, and this is the indisputable evidence, the defendant at the time of the offense charged was not engaged in preparing for use perishable goods, and therefore is not within the exception of the statute.

If the Legislature intended to permit establishments which, because of the necessities of the case, have only a short season, to work overtime, it should have so worded the law. The defendant's appeal is to the Legislature, not the courts. Courts must construe a statute as it is written, not as a legislative committee presumed to write it.

Counsel for the defendant likewise contends that inasmuch as there are no other establishments in the state, except candy factories, to which the phrase "engaged in the preparation for use of perishable goods" can apply, that it was the intention of the Legislature and that therefore the defendant is within the exception.

This construction is forced. The court can not say that the language used is a circumlocution for "candy factories." Had the Legislature intended this, it should have used words whose meaning is free from doubt.

There can be no doubt that if the defendant had been employing female labor overtime to prepare goods which otherwise would have perished there would have been no violation of the law. But, as already stated, the evidence conclusively shows that the goods were made in September for the fall holiday trade because they could not be made in summer. But the charge is for working overtime in the fall, not in the summer.

There being no error in the record, the judgment is affirmed.

1913.]

Blume v. Thompson et al.

MEASURE OF A WIDOW'S LIFE ESTATE.

Common Pleas Court of Auglaize County.

HARRIET C. BLUME v. CHARLES J. THOMPSON ET AL.

Decided, 1913.

Wills—Power of a Widow to Sell Limited to Her Needs—Distribution of the Vested Remainder, where Devises Are Made in Succession to Various Persons and Objects.

1. The estate devised by the testator to his widow in this case, while it might under some circumstances amount to more than a life estate in value, is less than a life estate as that term is ordinarily understood, inasmuch as the broad power and discretion confided in her to sell and use, is subject to the limitation that the income if sufficient, and proceeds from sales if necessary, can be used only for her own comfort, convenience and benefit, and neither the income nor principal can be used in building up a separate estate, the legatees having a vested remainder in so much of the estate as remains unconsumed at the death of the widow.
2. Lines drawn through the clause of a will, by express direction of the testator, for the purpose of cancelling such clause, and done before the same is signed, render such clause ineffective, and it is no part of the will of the testator.
3. A board of education is authorized to accept a bequest to be used in the erection and maintenance of a building to be used jointly for a public library and Young Men's Christian Association.

MATTHIAS, J.

On July 4th, 1912, L. N. Blume died, leaving Harriet C. Blume, his widow, his sole heir at law. His estate, at the time of his death, was valued at approximately \$125,000 above indebtedness.

On December 7th, 1911, he had executed a will, which was duly admitted to probate, in the first item of which he expresses a desire for the prompt payment of his debts and funeral expenses. By item second he gives and devises to his wife, Harriet C. Blume, lot No. 18, situated in the village of Wapakoneta, county of Auglaize and state of Ohio, "to be hers absolutely and in fee simple."

Item three thereof is as follows:

"I give, bequeath and devise to my beloved wife, Harriet C. Blume, all the remainder of my property, both real and personal, of whatsoever kind and wheresoever situated, which I may own or have the right to dispose of at my death stated, with the understanding that she, my said wife, shall have the right to use, sell or dispose of, except as hereinafter stated, any or all of said property, real or personal, for her own comfort, convenience or benefit in any manner she may see fit during her lifetime."

The fourth item of said will provides that, "out of the property remaining at the death of my said wife I give and bequeath the following amounts respectively to the following named persons in the order named, to-wit:" Here follows a list of bequests to a number of individuals named, including therein the following clause: "To Harriet, Wesley, Lewis B. and Ethel King, the four children of Harriet King (a widow), formerly intermarried with Frederick Sallava, my wife's brother, the sum of two hundred and fifty (\$250) dollars each." Item fifth is, "I next give and bequeath the sum of five hundred dollars (\$500) to each of the following named churches in Wapakoneta," and six churches are there named. Item sixth is, "I next give and bequeath the sum of five hundred dollars (\$500) to each of the following named lodges in Wapakoneta," naming six fraternal orders, and then provides: "said sum to be paid to the proper trustees or officials of each of said societies."

Item seventh of said will is as follows:

"Provided there are sufficient funds left out of my estate after the payment of the bequests, legacies and devises made in this will, I next give and bequeath to the board of education of the school district of Wapakoneta, Ohio, the sum of fifty thousand dollars (\$50,000) or such other less sum as may be left for the purpose, for the purchase of the necessary land erection of a building and maintenance of same for a combined Public Library and Young Men's Christian Association building, to be called the 'Blume Library and Y. M. C. A.,' for the use and benefit of all the people and citizens of Wapakoneta and vicinity, the same to be in charge of and under the con-

1913.]

Blume v. Thompson et al.

trol of said board of education. All the above gifts and bequests are to take effect at the death of my said wife and are to be paid out of the property then remaining at her death, unless my said wife chooses to carry out any of said bequests before her decease."

The remaining portions of said will, copied in full, are as follows:

"Eighth. I request and suggest to my said wife that as soon as convenient for my wife after my death that she, my said wife, shall pay over to the First National Bank, of Wapakoneta, Ohio, the sum of forty thousand dollars (\$40,000) in cash, stocks or bonds, acceptable to said bank, but only upon the condition and provided that the acceptance of the same be acted upon by the board of directors of said bank by resolution that said bank shall pay to my wife as long as she lives four (4) per cent. interest on said sum of \$40,000, payable semi-annually, and at the death of my said wife said sum of \$40,000 shall become absolutely the property of said bank; the carrying out of this eighth clause of my will and the payment of said sum of \$40,000 to said First National Bank of Wapakoneta, shall be entirely discretionary with and at the option of my said wife, and if she does not desire nor care for any reason to pay over said sum of \$40,000 to said First National Bank, then it shall not be obligatory upon her to do so and this clause shall be null and void."

"Ninth. All the residue of my property, real or personal, still remaining at the death of my said wife and after the payment of above gifts and bequests, I desire shall go to and be divided between my lawful heirs, according to law, with the understanding that heirs of the half blood shall count and be considered the same as heirs of the whole blood, and provided further that Charles J. Thompson, my wife's nephew, shall receive a share of said residue of my estate the same as if he were a full and lawful heir, viz: The same share as my half sisters and half brothers; and except that my sister, Harriet C. South and her three sons, Rufus B. South, Arthur L. South, and Dwight D. South, my nephews, shall receive no share of said residue nor any part of my estate whatsoever. I nominate and appoint Harriet C. Blume, my wife, to be sole Executrix of this Will and request that she be not required to give bond and that no inventory or appraisement be made of my estate."

On May 11th, 1912, testator executed a codicil to said will, which is as follows:

"I, L. N. Blume, of Wapakoneta, Ohio, do make, publish and declare this to be my codicil to my last will above set forth, I hereby revoke and annul the bequest of \$500 made to the Catholic Church of Wapakoneta, Ohio, as set forth in item fifth of my will, having recently executed and delivered two notes for \$500 each, payable to Wm. Russ of said Catholic Church, not yet due, which said note shall be in lieu of the \$500 bequest to the other churches. I hereby ratify and confirm my said Will in all other respects."

Under favor of Section 10857 of the General Code, Harriet C. Blume, as executrix of said will, brings this action, and asks the direction and judgment of the court upon all of the provisions of said will that are in anywise ambiguous or uncertain, and that said will be so construed that plaintiff may be guided and instructed by the decree of the court as to the meaning, application and effect of the various provisions of said will, and that she be given such direction as is necessary to properly administer the trust imposed upon her by the terms of said will.

Said Harriet Blume, as the widow of L. N. Blume, under favor of Section 10567 of the General Code, has also filed an answer, in which she also asks such a construction of the terms of said will as is necessary to advise her of her rights thereunder so that she may be thus aided in making her election whether to accept the provisions of said will or take distributive share of said estate under provision of the law.

The first question which arises, and the first particular in which we find it necessary to construe and determine the meaning of said will, is with reference to the quality and quantity of the estate devised and bequeathed to said Harriet C. Blume. This question is foremost because the determination of others depends somewhat upon the conclusion reached with reference to this one.

Before taking up these various portions of this will, in what seems to us the most logical order, we deem it well to first indulge in some generalization with reference to the rules that

must govern in the construction of wills. By "construction," as here used, is meant the ascertaining and determining of the testator's intention as expressed in this will. As well suggested by Page, Section 460, courts are careful to discover and enforce the testator's intention, but can not make a new will for the testator, and it therefore follows that they constantly refuse to ascertain the testator's intention except from the words which he used in his will, together with such extrinsic evidence as is admissible. Hence, the question which the court must have constantly in mind is not what should the testator have meant to do, or what words he meant to use, but, rather, what did he mean by the words which he has actually used. Rules of construction adopted and followed are of value only for the purpose of ascertaining the intention of the testator. As stated by Chief Justice Marshall, in the case of *Findlay v. King*, 28 U. S., 345:

"The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail."

In this connection we quote further from *Page on Wills*, Section 461:

"Assuming, as we must, in a case of construction that the testator had testamentary capacity at the time of making the will, that he was under no restraint, and the will as made is in full compliance with the rules of law on the subject, the sole question for the consideration of a court for construction is, what testator meant by the provisions of the will which he has seen fit to make. This proposition has been put by the courts in such a variety of forms, and with such uniformity of view, that it is hackneyed."

It is also fundamental that the intention of the testator is to be ascertained from consideration of his will as a whole, and not from its disjointed fragments, and all parts of the instrument must be construed in relation to each other, so as to give meaning and effect to every clause and phrase. Hence, if two constructions are possible to a clause of a will, one of which is in harmony with the provisions of the remainder of

the will, and the other of which is at variance with them, the court will assume that the correct construction is the one which will harmonize this clause with the rest of the will. The will is to be construed as an entirety, and if possible all provisions reached rendered consistent with each other. It is fundamental also that an obvious general intent gathered from the whole will is rarely to be defeated by an inaccuracy or inconsistency in the expression of a particular intent. These propositions that are to govern in the construction of wills are unquestioned, and we state them, rather restate them, so that we may all have them clearly in mind as we take up for examination and construction the will before us.

Usually so-called precedents are of little value in the construction of a will, for the reason that wills vary so greatly in their terms, and a conclusion as to one may be, usually is, of but little, if any, service in the construction of another. As once said by Judge Story, "the analogies afforded by precedents are helpful servants but dangerous masters." However, we find much aid in the decisions of the court of last resort of this state in the consideration of the nature of the estate taken by the widow under this will. But we shall not undertake in this decision an analysis of each of the decisions in Ohio which is applicable, nor attempt a comparison of each of them with the case at bar.

The language used by the testator in the early case of *Bishop v. Remple*, 11 O. S., 277, is distinguished from that used by testator Blume in that there was no limitation whatever upon the right or authority of the wife to sell any portion of said estate; no limitation whatever upon the use to which said property or the proceeds thereof might be applied. Hence, in that case the court held that the widow had an absolute right to sell and convey. In the subsequent case of *Pruden v. Pruden*, 14 O. S., 251, the testator used language in effect much the same as that used in the previous case cited, except that there was a limitation imposed by the words "for her benefit and support." The court there held that the declared purpose of the testator was to provide for the support of his widow. The court say:

1913.]

Blume v. Thompson et al.

“We are lead to the conclusion that the will does charge upon the entire property the support of the widow and that she is entitled to use either principal or interest or both so far as may be necessary for this purpose; and that the heirs have a valid estate in remainder to what may be left when this object has been accomplished.”

The decision of the court in *Baxter v. Boyer et al*, 19 O. S., 490, is helpful in the consideration of the will before us, but the use and enjoyment of the estate there was unrestricted.

In the case of *Huston v. Craighead*, 23 O. S., 198, the court was called upon to construe a will in which, subject to the payment of his debts and certain legacies, the testator devised and bequeathed to his wife all his property, to be held by her during her natural life, provided she lived a widow; and declared it to be his will that she should have the entire management of his estate, and that she might sell and dispose of it whenever and in such manner as she might “think best for herself and heirs;” and provided that at the death of his wife whatever might be left of his estate, after payment of the legacies and the debts of his widow, should be equally divided among his children, it was held that the will did not give to the wife an absolute right to the personal property of the testator nor a fee simple in his real estate, but gives her a life estate and life support, with power to manage, sell and dispose of the property in any manner, that in her judgment, will best promote her own welfare and benefit the estate; but she is not thereby authorized to dispose of the property by giving it to some of the children of the testator. The Supreme Court, in that decision, say (page 208):

“It is evident that the testator intended to confer upon his wife ample power to obtain a support from his estate, and had such confidence in her that he was willing to empower her to manage, sell and dispose of his estate in any manner that in her judgment would promote her own welfare and best subserve the interests of the estate. Within the limits of the power thus conferred her discretion is conclusive.”

We refer to the language of the court in deciding the case of *Posegate v. South et al*, 46 O. S., 391:

"The bequest contained in the second item of the will is absolute and, unaffected by any other provision of the will, would vest in the widow, the unqualified ownership of the property bequeathed to her. If it be conceded, that the third item, which, at her death, gives the personal estate, or so much thereof as shall be unconsumed to the testator's children, so qualifies the previous bequest, as to reduce the estate given by it to the widow, to one for life, it must also be admitted, that it is a life estate with the right to the possession, use, enjoyment and consumption of the property by her without restriction, either upon the mode of its use and enjoyment, or the extent of its consumption; for, it is only so much as shall remain unconsumed at the death of the widow that is given over to the children and no limitation is found in the will, upon the nature of the use to which she may subject the property, and her power to consume it is uncontrolled. Such right of use, enjoyment and consumption, necessarily implies the right to the possession of the property, since, without its possession, it could neither be used, enjoyed or consumed. The duty of the executor, under the will, therefore, was, after the payment of the debts and funeral expenses of the testator, to deliver possession of the personal estate of the widow."

The discussion of the court in the case of *Minyoung v. Minyoung et al*, 47 O. S., 501, is also of considerable force and effect in the consideration of the will before us. There, as here, the testator devised and bequeathed to his wife, substantially all his property and authorized the use for her comfort and convenience all that, in her judgment, was necessary. The court there held that the widow took a life interest and a life support in the property with the right to control it and the principal and income so far as may be reasonably necessary for her own comfort and convenience, subject to the trust of supporting and educating her son, as required by the terms of the will, and that the children took an estate in remainder to what may be left when such object shall have been accomplished, vested in interest, though contingent as to amount.

The decision of the court in *Johnson v. Johnson*, 51 O. S., 446, is not only instructive, but we believe absolutely controlling in the disposition of the question we have before us in this case. There Judge Burket, who delivered the opinion, reviewed not

1913.]

Blume v. Thompson et al.

only the cases we have cited, but many others. This decision aids us materially, not only in determining the estate devised and bequeathed to Mrs. Blume, by this will, but it also clearly points out that the legatees named in this will have a vested remainder in so much of the estate as may remain unconsumed by Mrs. Blume at her death. The language used by the testator in the will before us as did that in the will there considered authorizes and requires that the widow be given full possession and power to use and dispose of said estate for her own support, and places upon her the duty which is in the nature of a trust to have due regard for the rights of those in remainder as to the part of the estate not consumed by her for her support. Language used in the will there under consideration, much less clear in its terms of limitation than that used in the will before us, was held by the court to show the plain intention of the testator that the property was "given to the widow to be by her used and consumed, and that while so using and consuming the same she is empowered to bargain, sell, convey, exchange or dispose of the same as she may think proper, limited, however, in the exercise of such power to the purpose for which the property is given to her, that is, for her consumption."

That the estate taken by Mrs. Blume can not be more than a life estate with power to sell and dispose of any and all of such estate, but only for the purpose stated, we think is settled by the unbroken line of authorities, not only in this state but elsewhere.

In the case of *Home v. Lippardt*, 70 O. S., 261, the court clearly states the rule applicable here to be, "That when an estate is devised with an absolute power of disposal a devise over of what may remain is void, but that where a life estate only is given in express words to the first taker, with an express power in a certain event, or for a certain purpose, to dispose of the property, the life estate is not by such a power, enlarged to a fee or absolute right, and the devise over is good."

In this decision Judge Summers has collected and revised many decisions from which the rule thus stated is so clearly deduced.

Because we believe it especially applicable in the consideration of item three of this will, we quote the following from one of the decisions cited by Judge Summers, that of *Stuart v. Walker*, 72 Me., 148:

“Where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, then the words last used do restrict and limit the words first used, and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus: A gives an estate to B with the right to dispose of as much of it, in his life time, as he may need for his support, and if anything remains unexpended at B's death, the balance to go to C. Here there may be something to go over. B is to dispose of the estate only for certain specified purposes. He can defeat the remainder only by an execution of the power.”

It is further shown in this decision that where the life estate is expressly created instead of arising by implication, absolute control does not amount to absolute ownership, and unqualified power of disposal does not enlarge the estate to a fee. This proposition is concisely stated by Page, Section 576.

What then does Mrs. Blume receive by virtue of item three of this will, and what duties and obligations are imposed upon her thereby? We think the intention of the testator is clearly shown to be that, not only the use of the income from his property shall go to Mrs. Blume, but that all his property shall go to her with this limitation, that she may use the income and also consume any portion of the estate, but only so far as necessary for her own comfort, convenience or benefit. We regard this provision for Mrs. Blume as less than a life estate, although it may be more than a life estate in value because of the power conferred upon her to sell and use any or all of the estate for her comfort, convenience or benefit; but it is less than a life estate in that she is not authorized to use any portion of it, not even the income therefrom, for any purpose other than that named in the will.

The fore part of item three clearly gives to Mrs. Blume a life estate in all the property of the testator, except lot 18, which

1913.]

Blume v. Thompson et al.

he had theretofore given to her absolutely, but the latter part of said item, while conferring power upon Mrs. Blume to sell and dispose of said estate, limits the use, not only of the principal, but of the income as well to the purpose therein stated, that is, "for her own comfort, convenience or benefit." After stating that Mrs. Blume shall have said property during her natural life only, such provision is qualified by limiting the use thereof, and consequently the income therefrom to the purpose therein expressly named. The same limitation is placed upon the use as upon the purpose for which sale may be made. This is an instance where "the words last used to restrict and limit the words first used," and it must be found, from a consideration of this entire will, that it was the intention of the testator that his estate, the income if sufficient, but the principal if necessary, should be used by Mrs. Blume "for her own comfort, convenience and benefit," but the use to which either the income or principal may be applied is to be limited to such purpose. It follows then that Mrs. Blume, under the terms of this will, would not be entitled absolutely to the income from this estate, but only so much thereof as would be necessary for her own comfort, convenience and benefit, and if that were not sufficient for such purpose she could use any portion of the body of the estate necessary therefor. She could not use the income to build up a separate estate. Such conclusion must be declared from a consideration of the entire will.

The power of use and sale conferred in the will considered by the court in the case of *Houston v. Craighead*, 23 O. S., 198, was much broader than in this will. Neither is such unlimited power conferred here as by the will construed by the court in the case of *Posegate v. South*, 46 O. S., 391, the use given of the estate there was unlimited and unrestricted while here the right to use as well as the purpose of sale, is limited to "her own comfort, convenience and benefit." The same observation could be made of the will construed in *Baxter v. Bowyer*, 19 O. S., 490.

While the estate devised to Mrs. Blume is thus limited, the power vested in her is broad and the discretion confined to her is unlimited as to the manner of use, sale or disposition of

said property, so long as it is necessary for her own comfort, convenience or benefit.

Here arises the duty devolving upon her as a trustee of said fund for those in remainder, for that such is her relationship to the legatees named in this will, we think there can be no question. The rule stated in *Johnson v. Johnson*, 51 O. S., 446, clearly applies, and while she can "use and enjoy the estate to its fullest extent for her support, and consume the whole of it if necessary, she could not go beyond what would be regarded as good faith toward the remainderman."

At this point we should probably give consideration to the question raised by counsel for the defendants as to the meaning of the clause twice used in item three, "except as hereinafter stated." We can not acquiesce in the suggestion made that it was the purpose of the testator to have set aside a fund sufficient to meet the legacies named in items four, five, six and seven, of this will, and the same "held separate and apart to be kept intact and sacred for the purposes of paying the same to these respective parties." In our opinion the language of the entire will can not be so construed. The one desire testator does make plain is that his entire estate shall be held to meet the necessities of his wife, and all bequests are subordinate to the provision for her, and are to be paid out of what remains after she is cared for, and can not be paid until after her death except so far as she chooses to pay them. The clause referred to need not and should not be given any consideration whatever if in subsequent portions of the will no exception is made to which said clause may have reference. Such exception or limitation can not apply to the bequest named in the fourth item, for that immediately follows the item in which such clause is used and there not only the time, but the limitation or payment of those bequests is emphasized by testator, by stating at the very beginning of the item making such bequests, "out of the property remaining at the death of my first wife, to the following named persons in the order named." The first, "except as hereinafter stated" may, and probably does mean, that while she has all of said property

1913.]

Blume v. Thompson* et al.

during her natural life only, yet that she is free to dispose of any of it in any manner she sees fit, it for the purpose stated, and thus by this clause her right of use is expanded rather than limited. The same clause repeated after giving authority to use, sell or dispose of, seems to contemplate the making of such a limitation later in the will. We have seen that there is no such limitation in item four. Neither is there in item fifth, for the bequests named in item fourth are to be paid out of property remaining at the death of the wife, and the bequests named in item five are inferior to those named in item four, for the testator says, "I next give and bequeath," and the bequests named in item five are such that neither takes precedence over the other. Neither is there any such limitation specified in item six, for those are given and bequeathed "next," meaning after the payment of the bequests named in item five. Certainly such limitation is not made in item seven, for that provision is contingent upon the sufficiency of said estate to meet it "after the payment of the bequests, legacies and devises made in this will." That no such limitation had been made anywhere in said will up to the eighth item, as it seems the testator contemplated in the beginning of said will he would subsequently state, is settled beyond dispute by the language used in the latter part of item seven, "All the above gifts and bequests are to take effect at the death of my said wife and are to be paid out of the property then remaining at her death, unless my said wife chooses to carry out any of said bequests before her decease." No such exception is stated in either item eight, nine or ten. It seems plain that if the testator contemplated, at the beginning of the preparation of his will, to make some exception as to the use or disposition of his property, he, upon further consideration, did not make or express such exception or limitation, other than that which may appear in item ninth, so-called, which was canceled by having lines drawn through it before the will was in fact executed.

The first statement of said clause in item three may have had reference to the subsequent provision authorizing the wife to pay any of the bequests named at any time she desired. No

such exception having been expressed by the testator whereby the right conferred upon the wife to possess and control all of said property during her lifetime is limited or abridged, it follows that the right of use and enjoyment, coupled with the power to sell and dispose of said property for the purposes stated in any manner she may see fit, "necessarily implies the right to the possession of the property, since, without its possession, it could neither be used, enjoyed or consumed." In this particular the rule laid down in *Posegate v. South et al*, 46 O. S., 391, applies, and after the payment of the debts and funeral expenses of the testator it will become the duty of the executrix to deliver possession of said property to Mrs. Blume, the widow, who will hold it in trust for the legatees named in said will, subject to her right to use so much of the estate as necessary "for her comfort, convenience and benefit."

Under the authorities we have cited the legatees named and referred to in said will have a valid estate in remainder to what may be left of said property referred to in item three, after the objects and purposes stated therein shall have been accomplished.

The next question presented arises in the consideration of item four, which contains a number of bequests, among them being one "to Harriet, Wesley, Lewis B. and Ethel King, the four children of Harriet King (a widow), formerly inter-married with Frederick Sallada, my wife's brother, the sum of \$250." The evidence shows that there are but three children of Harriet King referred to, being Wesley, Lewis B. and Ethel; it further appears from the evidence that the relations of the testator with this family have been close, they having visited frequently and that he well knew the members of the family and that there were but three children, all of whom are grown, two being married. There is here a devise to Harriet King, and it is shown that there is but one Harriet King who could possibly have been intended and it must be concluded that probably, by error or misunderstanding of the scrivener, the word "four" instead of "three" was used. The names of the legatees are stated and each of the four named persons is entitled to the legacy bequeathed.

1913.]

Blume v. Thompson et al.

By the fifth item of said will the testator bequeaths five hundred dollars to each of the churches of Wapakoneta therein named, and directs that said sum be paid to the proper board of officials of each of said churches. By codicil heretofore stated the bequest of five hundred dollars to the Catholic church is specifically revoked and annulled. A question has arisen as to the effect of the codicil upon the bequest to the other churches named by reason of the language used by the testator for the evident purpose of stating his reason for revoking the bequest to the Catholic church. Following such revocation, "having recently executed and delivered two notes for five hundred dollars each payable to William Russ of said Catholic church, not yet due, which said note shall be in lieu of the five hundred dollar bequest to the other churches." There is no revocation of the bequest to the other churches specifically stated, and it can not be concluded that the phrase "in lieu of" as here used was meant to work a revocation of such bequest. We apply, in the consideration of this question, the rule stated in Section 462 of Page on Wills:

"Where a codicil is appended to a will and does not contain any clause of revocation, the provisions of the will are to be disturbed only as far as are absolutely necessary to give effect to the provisions of the codicil; and in other respects such a will and codicil are to be construed together."

Undoubtedly the testator not having revoked the bequest to the other churches, means by the language used in stating the reason for revoking the bequest to the Catholic church that while that church has been given the two notes instead of the bequest theretofore made, each of the other churches is to have the bequest theretofore made in behalf of each.

The amended petition sets out, with precision, the name of each of these churches, and also fixes clearly the identity of the lodges referred to in item six. We find that each of said churches named in item five, and more particularly described in the amended petition herein, excepting herefrom, of course, the Catholic church, is entitled to receive the bequest of five hundred dollars. We further find that each of said lodges

named in item six, and clearly identified in the amended petition herein, is entitled to the bequest of five hundred dollars.

The bequest to various churches should be paid at the time indicated in said will, payment to be made to the treasurer of each church upon acceptance of bequest by resolution of the board of trustees or council thereof as the case may be.

The bequest to each of said lodges named to be paid at the time indicated in said will, payment to be made to the treasurer or officer of each lodge having charge of its finances, upon acceptance of such bequest by resolution duly passed by the respective lodges.

Although our attention has been directed by counsel, in argument, to item eight of said will, and the suggestion made that the court should determine and state its construction, or, rather, its interpretation thereof, and state the rights of Mrs. Blume under this item if she take under the will and if she take under the law, it is not claimed by any of counsel that such item gives rise to any trust or amounts to more than a mere suggestion, that Mrs. Blume pay over forty thousand dollars in cash, stocks or bonds to the First National Bank of Wapakoneta, and that the bank pay her four per cent. interest thereon, and that upon her death said forty thousand dollars become absolutely the property of the bank; the testator then adds that such payment shall be entirely discretionary with and at the option of his wife and if for any reason she does not care to pay said sum to the bank, then it shall not be obligatory upon her to do so then this clause shall be null and void. Undoubtedly Mrs. Blume may exercise the option given and pay over said forty thousand dollars to the First National Bank in the manner and upon the terms stated in said item eight and said terms complied with the bank, said forty thousand dollars would become absolutely the property of the bank upon the death of Mrs. Blume. However, the interest paid her by the bank could not be used in any other manner than that which we have announced heretofore, that is, only so far as necessary for comfort, convenience and benefit. The nature of this provision is such that the bank has no vested interest whatever in said estate, unless Mrs. Blume elects to pay over said forty thou-

1913.]

Blume v. Thompson et al.

sand dollars to the bank in the manner specified in said item eight.

It was suggested by counsel that the court show how Mrs. Blume may best indicate her purpose with respect to the suggestions made in said item. Her purpose in this matter ought to be in some manner determined and announced. We know of no better way to suggest that this be done than by giving a written motive of her conclusion with reference to this matter to the bank, and filing a copy thereof in the proceeding now pending in the probate court.

In this connection perhaps we should consider also the latter part of item seven of said will, and determine its effect. We are clearly of the opinion that said clause is not limited to the provisions of the seventh item of said will, but has reference to all of the gifts and bequests named in said will preceding such clause, and that none of the gifts and bequests named in said will preceding the eighth item do take effect until the death of Mrs. Blume, and that they are to be paid out of the property remaining at her death, but Mrs. Blume, whom we have found is entitled to the possession of all of said estate after the payment of the debts, may carry out any of said bequests before her decease. Unlimited authority is given, and unhampered discretion is confided to her to consummate any of the gifts and bequests named in said will preceding item seven at any time. Said clause refers rather to what precedes item seven for that bequest is contingent upon the sufficiency of the estate to pay the preceding "bequests, legacies and devises."

Hence, if she pay them, she may determine the order in which they shall be paid. She may pay none of them. She may pay all of them. If they are not paid by Mrs. Blume during her lifetime, then we think the purpose of the testator that all of the legacies named in item four shall be considered as a class to be paid before legacies named in any subsequent item, but that the full amount stated is to be paid to each in the order named, as indicated in the beginning of said item, and that they would not *pro rate* if the estate was not sufficient to pay off. After

the payment of the legacies named in item four those named in item five, as modified by the codicil, would be paid, and if there was not enough of said estate to pay all, they would *pro rate*. If the estate remaining were sufficient to pay the bequests named in items four and five, the next paid would be those named in item six, and if said estate were not sufficient to pay all named in item six, that those would *pro rate*, no preference being given by the testator.

In another connection we have referred to a clause in said will preceding item ninth. The evidence shows that, by direction of the testator, the scrivener drew lines across the same for the purpose of cancelling and revoking that clause before the will was signed, and it appeared also before the remaining portions of the will were written, for that clause was numbered "ninth," and the item which follows it, as the will was executed, is also numbered "ninth." Therefore, no force or effect should be given to said clause.

This brings us to a consideration of the seventh item of said will. The plaintiff asks the court to determine whether the benefaction named therein is a lawful one and whether the board of education of the school district of Wapakoneta, Ohio, may receive any money for the purpose named in said item seven.

It is urged that while a board of education may take and hold, in trust, and devise, bequest or donation, such taking and holding is limited to the use and benefit of such district, and that they may exercise such powers and privileges as are conferred by the laws relating to the public schools of the state. This is the provision of Section 4749 of the General Code, but Sections 7631 to 7642 contain provisions conferring much greater authority than the bequest here in question. Section 7631 provides that:

"The board of education of any city, village, township or special school district, by resolution, may provide for the establishment, control and maintenance, in such district, of a public library, free to all the inhabitants thereof. For that purpose, by purchase, it may acquire the necessary real property, and erect thereon a library building; acquire, by purchase or otherwise, from any other library association, its library prop-

1913.]

Blume v. Thompson et al.

erty; receive donations and bequests of money or property for such library purposes and maintain and support libraries now in existence and control by the board."

Section 7632 authorizes a levy of not to exceed one mill for library fund, to be expended by the board for the establishment, support and maintenance of such public library.

There can be no question then as to the authority of the board of education of the school district including Wapakoneta to receive a bequest and use the same for library purposes. The question then arises whether such bequest shall fail because of the provision in said item seven that such building shall be maintained for a public library for Young Men's Christian Association building. Trusts created by gift in the interest or promotion of education are universally recognized as charitable, and are to be liberally construed and operated to the end that the intention of the donor may be carried out as near as can be done under all the circumstances. They are highly favored by the law and should receive such construction as would tend to preserve rather than to destroy them. *Pomeroy's Equity Jurisprudence*, Section 1023; *Trustees McIntire v. Zanesville Mfg. Co. et al*, 9 Ohio, 203; *Zanesville Mfg. Co. v. Zanesville*, 20 Ohio, 483; *Miller v. Teachout*, 24 O. S., 525; *Bd. of Education v. Ladd, Admr.*, 26 O. S., 210.

Among the charitable trusts most liberally construed, have been those created for the promotion of religion and education. *Sowers v. Cyrenius*, 39 O. S., 29; *Rockwell et al v. Blaney et al*, 9 N.P.(N.S.), 495, and cases there cited.

Surely then unless this trust is impossible of execution, it should not be permitted to lapse. It is held in *State, ex rel Atty.-Gen., v. City of Toledo*, 3 C.C.(N.S.), 468, that "Although such power is not expressly conferred a municipality has authority to receive property in trust for educational and other purposes beneficial to its inhabitants." It does not appear to us that this trust is impossible of execution by the trustee named; if it were, rather than permit the trust to fail, we think the rule would apply which would authorize a court of equity to appoint a trustee. The exercise of the powers conferred by

the trust we do not believe inconsistent with duties imposed upon boards of education. By the law of the state Young Men's Christian Associations seem to be regarded as belonging to the class known as "charities," and are authorized to accept legacies, devises and bequests. They therefore can not be regarded as incompatible. It is to be observed, too, that this bequest to the board of education is "for the purchase of the necessary land, erection of a building and maintenance of same, for a combined public library and Young Men's Christian Association building, to be called the 'Blume Library and Y. M. C. A.,' for the use and benefit of all the people and citizens of Wapakoneta and vicinity, the same to be in charge of, and under the control of said board of education." The board is authorized to use this bequest for the purchase of land and the erection and maintenance of a building thereon, which building is to be in charge of and under the control of said board. The bequest is not made for the maintenance of a library or the management or maintenance of a Y. M. C. A., but rather to provide and maintain a building, in so far as the funds will serve that purpose, which building is to be given the name specified.

It is our opinion that the authority of the board of education is ample to receive this bequest and execute the trust which it carries.

Consonant with the letter and spirit of Sections 10857 and 10567, General Code, we have endeavored to definitely determine and clearly state the rights of the parties and organizations named or referred to in this will, and particularly to advise the executrix as to her duties and the widow as to her rights under said will.

A journal entry should be prepared in accordance with these conclusions, the costs of this proceeding to be paid out of the funds of the estate.

1913.]

State v. Rhodes.

PROVING CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE.

Common Pleas Court of Franklin County.

STATE OF OHIO V. R. STANLEY RHODES.*

Decided, April Term, 1909.

Bribery—Necessity of Relying on Acts Performed or Declarations Made a Sufficient Reason for Varying the Order of Evidence Offered by the State.

In a trial for bribery the court may properly determine the order of proof. In a case where the *corpus delicti* or the body of the crime can not be directly established, except by gradual building up of the structure by proof of a general conspiracy which tends to establish it, the court may within its discretion permit the proof of the alleged general conspiracy in the order of its alleged steps tending to prove the body of the crime.

Karl T. Webber, Prosecuting Attorney, R. W. McCoy and T. J. Duncan, for State.

Booth & Keating, for defendant.

KINKAD, J.

The case was an indictment for bribery. It was sought by the state to prove its cause by various acts and declarations alleged to have been done and made in pursuance of a conspiracy to defraud the city of Columbus in respect to a certain paving contract.

No direct evidence could be produced of the alleged act of bribery, the *corpus delicti*, it being necessary for the state to rely upon the acts performed, and declarations made, in pursuance of the alleged conspiracy. The defense protested against such rule.

The proof offered, to which objection was made, and which was the immediate cause of the discussion which covered a period

*For opinion of the Supreme Court on other questions involved in the case, see 81 Ohio State, 397.

of two days, related to one step alleged to have been taken by the defendant in the alleged conspiracy, said to have been the cause of the crime charged in the indictment. This suggested the question of the order of proof, which must of necessity be determined by the court, within its discretion. Much benefit was derived from the discussion, sufficient, perhaps, to enable the court to readily pass on all questions that may arise touching the admissibility of evidence promptly and without further consumption of time in argument.

It may be remarked that a controlling principle which led to the conclusion reached is that all rules of evidence are designed for the ascertainment and development of truth, and that courts must not build up a body of technical rules, or apply rules so rigidly, or in such a technical manner, as to make it impossible to demonstrate the truth.

In criminal procedure absolute certainty is not always possible, the law being satisfied with producing a certainty passing a reasonable doubt.

I think if the origin, purpose and history of the rule of evidence pertaining to the *corpus delicti* is kept in mind, and by disregarding mere technical barriers trial courts will have no difficulty in exercising its powers respecting the admission of testimony in such way as to develop the truth, and at the same time properly perform its duty and function in submitting the case to the jury.

The lengthy argument was had so that we could be fully advised of the claims of both sides, and an intelligent conclusion reached as to proper exercise of the order of proof, which is concededly within the province of the court. The court did not wish to be in haste about it, nor to make an order which would in the least degree prejudice either the state or the defendant.

It was readily apparent that this case, so far as pertained to the proof, was quite unlike the previous cases which have been tried growing out of the same subject-matter, and I did not propose to so exercise the discretion, as requested by the prosecuting attorney, unless I was clearly satisfied that absolute justice demanded it.

1913.]

State v. Rhodes.

Nor did I propose to exercise this discretion and consume a great deal of time, as in the previous cases, until I was convinced that I would be justified in the public expense, nor until I was reasonably satisfied that the entire case to be presented would justify it.

I had made up my mind that if, upon the statements of counsel for the state, there would probably be nothing to finally present to the jury, I would make short work of the case.

I had only two doubts in the matter. One as to the claim of the state regarding the alleged general conspiracy to defraud the city by procuring the award of the contract to pave East Broad street, out of which the several bribery charges grew.

Following the rule of the Haymarket case, 122 Ill., 1, and having solved that question in favor of the contention of the state, I then was ready to exercise the proper discretion by permitting proof of the alleged conspiracy by particular acts and declarations without first putting the state to proof of the general conspiracy, provided I thought there was enough proof as to the *corpus delicti* to warrant the final submission of the case to the jury.

I am frank to say, that, if I had reached the conclusion that there was not sufficient proof of the *corpus delicti* to warrant its submission to the jury, it was not my purpose to force the prosecutor to present that part of his case first, because I thought if the prosecutor had not sufficient evidence to warrant this course, that the fair and just way to the defendant and to the public treasury was to first test out the proof of the crime before proof of the alleged conspiracy.

The origin of the rule of evidence, its original purpose, and the extent to which it has been carried in this country, will more completely and satisfactorily demonstrate its utility under modern law.

The rule had its origin in English law in cases of murder.

"If after a man had been convicted of murder and hung, and those who clamored for his blood have found chronic happiness in contemplating the justice of the law, the infallibility of the tribunals and the unswerving decision of judicial evidence, the supposed murdered person appears, the situation is not pleasant. To avoid such exposure, the judges long ago in-

vented the doctrine of the *corpus delicti*, by which says Starkie, 'the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body'; a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survive their alleged murderers."

Bishop, in his Criminal Procedure, Section 1056, says:

"This doctrine requiring a special directness and clearness in the proofs of there having been a crime, was extended to larcenies from unknown persons and to some, and possibly all, other indictable delinquencies."

And the learned Bishop adds:

"Later, it has been regarded rather of caution than of absolute law. It is perceived that the only service it could ever he was to cover up those blunderings of justice which were apt to come to the public gaze; for if one was wrongly convicted through a blunder in any other part of the case than the *corpus delicti*, it would seldom become known, hence the like rule was not applied to such a case."

Bishop explodes the old idea that the *corpus delicti* can be proved only by direct evidence by an apt illustration of a man going into the London Docks sober, without means of getting drunk, and comes out of the cellars very drunk. It was reasonable evidence that the man must have stolen some of the wine in the cellar, though you could not prove that any wine was stolen or that any wine was missed.

So the rule has been established in this country with but little dissent that extra judicial confessions or admissions of guilt, alone and uncontroverted, are deemed inadequate to establish the *corpus delicti*, though the courts are satisfied with slight corroboration. 1 *Bishop Cr. Pro.*, Section 1059.

I am much impressed with the statement made by the learned Bishop that the rule of *corpus delicti* is one of caution rather than of absolute law, and from the very nature of things and because of the well established lines marking off the regular functions of court and jury, that to warrant the court in acting

there must be a total failure of proof of the *corpus delicti*; that where there is even slight corroboration it must go to the jury. The court performs its function when it permits the evidence to pass the jury.

I am also impressed with the fact that courts must not apply this rule of caution so rigidly as to result in a denial of justice. In the application of the doctrine to the class of crimes where it is next to impossible to prove the body of the crime, I apprehend it to be the duty of the court to be liberal in the exercise of the power of admitting testimony and submitting it to the jury.

In case of homicide, or of larceny of specific property, there is no hardship imposed upon the state in first requiring proof of the *corpus delicti*. But in crimes committed in secrecy, where it is possible for the giver and taker of a bribe to hide and conceal the body of the crime, a strict application of the doctrine of *corpus delicti* would make it well nigh impossible to convict.

Courts must not, by a rigid application of the rule, enable one, who may perchance be guilty of a crime such as is charged here, to hide behind the rule of evidence touching the *corpus delicti* and defy the state.

I am rather inclined to believe that there is some benefit to be derived, by analogy, from the rule of deduction drawn from the possession of stolen property, not satisfactorily explained.

The receipt of money received with the declared purpose of using it as a bribe by the one giving it, and received by the receiver for the self declared purpose of giving it as a bribe, followed by the admission of the receiver that the money had been so used, and followed also by the favorable action by the public official to whom it is declared to have been given, are circumstances, which, if proven as claimed by the prosecution, would warrant the submission to the jury. Added to this is the claim made by the prosecution that the check given for this money will be produced which is claimed to have passed through the banks, are sufficient to convince the court that it will be entirely justified, if such claims are made good, in permitting

the prosecutor to prove the alleged conspiracy step by step, without first proving the existence of the alleged general conspiracy. For the benefit of counsel, I call attention to cases which I have examined, and which were not cited in argument, and which, to a large extent, have aided me in reaching a conclusion respecting the order of proof. *State v. New*, 22 Min., 76. (Under the statute providing that confession should not be sufficient to support a conviction, in embezzlement, held that it was sufficient that there was evidence of the receipt of the money and failure to pay the same over, independent of the defendant's confession.)

Osborn v. Commonwealth, 20 S. W., 223. (Charge, poisoning cattle.) A detective told the defendant that the owner of the cattle had a grudge against him. Defendant suggested that revenge be taken, and that he should get some paris green and put it within reach of the owner's cattle, which he did, in company with the detective. In the conversation with him he confessed that he had given the owner's cattle paris green before, which is pertinent to the case on trial. Although the owner proved that his cattle had been poisoned by paris green before, the court held that the defendant's planning revenge and putting the paris green, in company with the detective, in reach of the cattle, corroborated the confession.

Greenwade v. Commonwealth, 12 S. W., 131 (Ky.). Under statute requiring other proof than the confession to prove the crime, the defendant having confessed that he committed the crime, and having also, in the same conversation, told where the horse stolen might be found, and the horse having been found there at that place, the resolution of the court was that evidence of the owner that he had been deprived of his horse, the finding of the horse where the defendant said it was, and the confession, authorized a conviction. See also *State v. Wescott*, 104 N. W., 341, 130 Ia., 1.

State v. Knowles, 83 S. W., 1083, 185 Mo., 141. (Specially paragraph 10 of the syllabus in S. W. Rep.) Full proof of *corpus delicti*, independent of the confession, not

1913.]

Griffen v. Realty Co.

necessary. *Corpus delicti* may be proved by circumstantial evidence. *Curran v. State*, 76 Pac., 577, 12 Wyo., 553. Circumstantial evidence case.

Flower v. U. S., 116 Fed. Rep., 244. See 1 *Bishop's Criminal Procedure*, Section 1056, cited in that case, stating that the rule requiring proof of the crime by independent evidence was rather one of caution than of absolute law.

In view of the conclusions reached by the court, it is suggested that the proof of the state be directed to the body of the alleged crime by proceeding to the proof of the alleged general conspiracy.

QUESTIONS PERTAINING TO THE WORKMEN'S COMPENSATION ACT.

Superior Court of Cincinnati.

AVONIA V. GRIFFEN V. THE CINCINNATI REALTY COMPANY ET AL.

Decided, October 18, 1913.

*Negligence—Joinder of Defendants Charged with a Joint Duty Toward
Employee—To Whom the Workmens' Compensation Act Extends—
Wife Can Not Recover for Services in Nursing Injured Husband
—But is Entitled to Damages for Loss of Consortium.*

1. Where a petition alleges that two or more defendants were charged with a joint duty toward an employee; that they were guilty of a negligent breach of such joint duty, and they by reason of their negligence said employee was injured, they are properly joined as defendants although the negligence of one was nearer in point of time to the injury than the negligence of the other.
2. The provisions of the Workmens' Compensation Act (General Code of Ohio, Sections 1465-37, *et seq.*), do not extend to any one save the injured workman himself, or his personal representative in the event of his death.
3. A wife can not recover, from one whose negligence caused her husband's injury, for loss of wages due to the fact that she gave up her separate employment to nurse him.
4. A wife may recover damages from one whose negligence caused the injury to her husband and thus deprived her of his consortium.

R. T. Dickerson and R. A. Black, for plaintiff.

Worthington & Strong, John L. Stettinius, Robertson & Buchwalter and Theo. C. Jung, contra.

OPPENHEIMER, J.

On defendant's demurrer and motion to strike from petition.

The several defendants in this case have filed motions to strike certain allegations from the petition, and demurrers to other allegations. Various questions have been thus raised which we shall consider *seriatim*.

(1) The demurrer for misjoinder of parties defendant will be overruled. This question was similarly raised in the suit of Andrew S. Griffen against the same defendants, now pending in this court, No. 55559. We there held that as the same duty toward plaintiff devolved upon each of defendants, and as the alleged breach of duty was participated in by the several defendants, they were properly joined in the petition. We think that the same rule applies to the case at bar.

(2) Plaintiff alleges that each of the defendants "employs five or more workmen regularly in the same business, and that neither of said defendants pays into the state insurance fund," etc. Defendants move to strike this allegation from the petition. We are entirely satisfied with the opinions heretofore rendered by Judge Pugh, of this court, in the cases of *Schafer v. Bickford Tool Company*, 13 N.P.(N.S.), 553, and *Zoz v. The Lunkenheimer Company*, Court Index, May 14, 1913. It was held in those cases that allegations such as these, in suits brought under favor of the Workmen's Compensation Act, are necessary and proper. However, this suit is filed by the wife, who alleges that she suffered certain pecuniary losses by reason of the injury to her husband. The act provides that employers who employ five or more workmen regularly in the same business, who shall not pay into the state insurance fund the required premiums, shall, under certain conditions, "*be liable to their employees for damages suffered by reason of personal injuries sustained,*" and "*also to the personal representative of such employees where death results from such injuries*" (General Code, Section 1465-60). The remedy thus afforded is not extended to any one save

1913.]

Griffen v. Realty Co.

the employee himself, or his personal representative in the event of his death. The act creates no new cause of action for the benefit of the wife, nor does it enlarge any old cause of action which she may have had. Therefore she can not take advantage of it, and the allegation in her petition is improper. The motion to strike out will therefore be granted.

(3) Plaintiff alleges that she nursed and cared for her husband for a period of fifteen weeks during which time she gave up her occupation as a seamstress, at which she earned \$8 per week, and that by reason thereof she has been damaged in the sum of \$120. Defendants move to strike this allegation from the petition, upon the ground that the element of damage is too remote.

A person who has suffered injury through the negligence of another may unquestionably recover the reasonable value of necessary nurse's hire and medical attendance (*Gries v. Zech*, 24 Ohio St., 330; *Connors v. Golding*, 53 Ohio St., 647; *Street Railway Co. v. Tucker*, 13 C. C., 411). A husband might even contract for the services of his wife, and recover the amount paid to her under such contract, if the amount be reasonable (General Code, Section 7999). But in the absence of a contract, such services as husband and wife may render to each other and such attention as they may bestow upon each other are presumed to arise out of the mutual "obligations of respect, fidelity and support," which in contemplation of law arise out of the marital relationship (General Code, Section 7995). For the value of these gratuitous services which are presumably prompted by affection, the husband can not recover, though they are usually far more valuable than the perfunctory ministrations of paid attendants (*Bowe v. Bowe*, 5 C.C.[N.S.], 233). The wife's duty to render such services is correlative with the husband's primary duty to support her which is imposed upon him by statute (General Code, Section 7997). In the case at bar it appears from the pleadings that the wife was employed independently. We need not concern ourselves with the uses to which her separate earnings were put. She had a perfect right to contract for her services, and if her husband had been compelled to employ a nurse by reason of her absence at her

work, defendant could not be heard to complain because she was not performing the wifely "duty" of looking after her household and her husband. But surely defendants can not be charged with the responsibility for her choosing temporarily to terminate her separate employment so that she might nurse her injured spouse. Such result could not be reasonably anticipated as a direct result of the alleged negligence of defendants.

While we find no case in Ohio directly in point, we might refer to the analogous case of *Cincinnati Omnibus Company v. Kuhnell*, 9 O. D. (Reprint), 197. That suit was brought by a mother to recover, among other amounts, the loss which resulted from her having to nurse a son who was injured through defendant's negligence and not being able to earn anything outside. For a charge which permitted such recovery, the district court reversed the case.

The motion to strike this allegation from the petition must be granted.

(4) The last question arises out of plaintiff's allegation that by reason of defendants' negligence she lost her husband's consortium for the period mentioned, to her damage in the amount of \$500.

Defendants contend that there is no precedent which permits the recovery by the wife for loss of consortium unless defendant's act is wilful or malicious. Counsel direct our attention particularly to cases such as *Westlake v. Westlake*, 34 Ohio St., 621, wherein it was held that to sustain an action by a wife for the loss of the society and companionship of her husband, plaintiff must show that the acts of the defendant which caused the alleged injury were malicious. Counsel admit that the husband may recover for the loss of his wife's consortium without showing malice or a wilful disregard of plaintiff's rights; but they insist that the same rule does not apply in cases in which the wife sues.

Now we are willing to assume that the loss of which plaintiff is now complaining is analogous to the loss which results from an alienation of her husband's affections—though perhaps not quite so permanent or attended with such acute mental distress. But it does not follow that defendants' liability is to be governed

1913.]

Griffen v. Realty Co.

by rules which apply to alienation cases. The wilful interference with the conjugal relationship, proceeding from an improperly regulated mind, is the very gist of an action of the latter class; while actions such as the case at bar are predicated upon a negligent act or omission of which the direct or proximate result has been the loss of certain valuable rights.

It is true that at common law a wife could not maintain an action for the loss of her husband's *consortium*, which may be defined as a composite of his "society, companionship, conjugal affection, fellowship and assistance" (*Tiffany on Persons and Domestic Relations*, page 75). This was because she had no property right in them. The explanation made by Blackstone is characteristic of the times in which it was written:

"The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury."

But there has been a gradual emancipation of married women since Blackstone's benighted day, which in Ohio, at least, has culminated in a series of statutes establishing her legal equality with her husband in everything except the right of suffrage. In all other respects she possesses the privileges and prerogatives of an unmarried woman; and though, it may sound a bit paradoxical, this includes the privilege of enjoying her husband's consortium and of complaining when she has been deprived thereof. As was said by our Supreme Court, in the recent case of *Flandermeyer v. Cooper*, 85 Ohio St., 327, at pages 339-340:

"There can be no reasonable contention but that the wife suffers the same injury from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract and in the very nature of things must be mutual, and while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was such that she could not, at common law, maintain an action of this character. Now her legal status is the same as that of

her husband. She has the same right to the control of her separate property, the same right to sue in her own name and, in a word, is in full enjoyment of every right that her husband enjoys, so that she comes clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the consortium of his wife. Either we must hold that the common law is fixed, unchangeable and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that when every reason and every theory for denying the wife the same rights as the husband, has entirely disappeared from our jurisprudence, that she is now equally entitled with her husband to every remedy that the common law affords, and we have no hesitation in adopting the latter view."

We therefore conclude that the wife has exactly the same right of action as the husband in such cases; and as the husband might sue for loss of the consortium of his wife in the event of her injury, without alleging wilfulness or malice on the part of the tort-feasor, so the wife may maintain an action under the same circumstances. A contrary view would seem to necessitate a disregard of legislative intent, and a retrogression to the antiquated doctrine of Blackstone. We are not so jealous of the privileges bestowed upon husbands by the common law, nor so insensible to the spirit of the times, as to adopt such views.

It is therefore our opinion that the demurrer upon this ground should be overruled.

1913.]

Meyer v. O'Dwyer et al

SUFFICIENCY OF THE LIQUOR LICENSING ACT.

Common Pleas Court of Lucas County.

JOSEPH MEYER V. JOHN A. O'DWYER AND CHARLES H. NAUTS, AS
THE LUCAS COUNTY LIQUOR LICENSING BOARD.*

Decided, December, 1913.

*Constitutional Law—Policy of the State With Reference to the Liquor
Traffic—Not Changed by. Recent Constitutional Amendment—
Validity of the Liquor Licensing Law—103 O. L., 216.*

1. The amendment of 1912 to the state Constitution, providing for licensing of the traffic in intoxicating liquors, does not change the policy of the state from that which obtained under the Constitution of 1851 by placing the said traffic upon the same basis as other lines of business; but on the contrary further burdens and restrictions are imposed upon the said traffic by this amendment and the number of persons who may be engaged therein is limited.
2. The prohibition by a state in a proper exercise of its police power of any business, calling or occupation which affects injuriously the health, good morals, peace or safety of society, is not in conflict with the Fourteenth Amendment to the federal Constitution.
3. The provisions of the liquor license law (103 O. L., 216), requiring that applicants for licenses shall be of good moral character, permitting the granting of licenses to corporations, limiting the number of saloons to one for each five hundred inhabitants, and giving preference to those engaged in the traffic prior to May, 1912, are not in contravention with the state Constitution; nor is there a grant of legislative power in the provision which invests licensing boards with authority to pass upon the moral character of applicants for licenses to traffic in intoxicating liquors.

*Allen J. Seney, Pierce J. Phelan and Frank A. Boyer, for
plaintiff.*

*P. E. Dempsey, Assistant Attorney-General, Kohn, Northup,
Ritter & McMahon and Fell & Schaal, contra.*

MANTON, J.

This cause comes on to be heard on the petition, motion for injunction, and demurrer to the petition; and is heard and submitted on such pleadings and the argument of counsel.

* Motion by plaintiff for an injunction overruled by the Supreme Court, January 13, 1914.

Plaintiff says that he brings this action on his own behalf as well as on behalf of a large number of other persons having a common and general interest in the matter involved in this action and in the relief sought.

The facts pleaded and admitted by the demurrer, and the law pleaded in the petition are as follows:

That plaintiff is a citizen of the United States and of the state of Ohio, and was such prior to the fourth Monday in May, 1912; that he was engaged in the business of selling intoxicating liquors prior to the fourth Monday in May, 1912, in Toledo, Lucas county, Ohio, and still is so engaged; that he is of good moral character; that the defendants are the duly appointed, qualified and acting county liquor licensing board for the county of Lucas, state of Ohio; that the people of the state of Ohio, on September 3d, 1912, adopted a Constitution and provided in and by Section 9 of Article XV thereof that license to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law; that on April 18th, 1913, the General Assembly of Ohio passed, in pursuance of the authority conferred by Section 9 of Article XV of the Constitution an act entitled, "An act to provide for license to traffic in intoxicating liquors, and to further regulate the traffic thereof;" that Section 9 of Article XV of the Constitution and Section 24 of the aforesaid act of the General Assembly provide that not more than one saloon shall be licensed in any township or municipality of less than five hundred of population nor more than one saloon for each five hundred of population in other towns and municipalities; that said act of the General Assembly provides that certain officials provided for therein shall have the power to designate the persons or associations of persons who shall be licensed and permitted to conduct said business, and that the defendants herein are the officials so provided for Lucas county; that said act of the General Assembly, by Section 48 thereof, provides that whoever sells intoxicating liquors without having been duly licensed as provided in said act shall be guilty of a crime and shall be subject to fine and imprisonment; that

1913.]

Meyer v. O'Dwyer et al.

Section 28 of said act provides that where the number of applicants for licenses exceeds the number of licenses allowed by law, preference shall be given to such applicants as are engaged in the sale of intoxicating liquors prior to the fourth Monday in May, 1912, or to their *bona fide* successors in title, provided they are otherwise qualified by law; that Lucas county has a population of about 181,909; that it is one of the counties of the state wherein it is lawful to traffic in intoxicating liquors; that on the first day of September, 1913, and for a long time prior thereto, there were in operation in said county 626 places where the business of trafficking in intoxicating liquors was conducted and that plaintiff conducted one of such places; that on or about the first day of September, 1913, plaintiff, and the others for whom he sues, filed with the defendants their applications for licenses to traffic in intoxicating liquors conformably to the said act, and said applications were received and filed by the defendants for their consideration; that plaintiff and the others for whom he sues paid to the defendants at the time of filing such applications the sum of five (\$5) dollars; that on or about the seventh day of September, 1913, defendants made and published a list of the applicants for said licenses, giving the names and residence addresses of applications and the places where such applicants expected to do business, and said list included the names, addresses and places of business of plaintiff and the others for whom he sues; that plaintiff's place of business is located at No. 1007 West Central avenue in Toledo, Lucas county, Ohio, and he is not now, nor was he at the time of filing his said application, interested in any way in such business at any other place; that on or about the fifth day of November, 1913, defendants announced the names of applicants whom they proposed to license, and also the names of those whose applications were denied, and the name of plaintiff and the names of the others for whom he sues were among those whose applications had been denied; that defendants propose to license individuals and associations who are now conducting business at some 363 different localities in said county, and among the favored applicants are thirty-five or forty corporations incor-

porated under the laws of different states. The application of plaintiff and those for whom he sues were denied for various wholly arbitrary and unauthorized reasons, the chief of which, and that given in most instances, was that defendants had already determined to license all that they were allowed to license under the law; that plaintiff and those for whom he sues are ready, willing and able to pay, and will pay—if under an order of the court they are permitted to continue in business—all fees, taxes and assessments which the law requires; that if denied the right to continue in business they will suffer irreparable injury to their property in the business and be subject to criminal prosecutions unless they abandon their business and lose their property.

The relief prayed for in the petition is as follows:

That the defendants be enjoined from granting licenses to corporations; be enjoined from discriminating between those who were engaged in business prior to the fourth Monday in May, 1912, and those who engaged in business after that date; be enjoined from discriminating between applicants for licenses by reason of any standard of moral character sought to be arbitrarily established by them; be enjoined from denying licenses to plaintiff and the others for whom he sues for the reason that defendants have determined to grant licenses to others to the number allowed by law; that defendants be required to license all applicants who will conform to so much of said act of the General Assembly as may be found by the court to be consistent with the Constitution of the United States and the Constitution of the state of Ohio, and for such further relief as is just and equitable.

The conclusions of law pleaded in the petition, and which form the basis of argument by counsel for plaintiff, are that the constitutional provisions and the legislative act referred to in limiting the right or privilege to traffic in intoxicating liquors to one in five hundred of the population is in conflict with the Fourteenth Amendment of the Constitution of the United States; that the Legislature in providing for license to corporations have violated that part of Section 9 of Article XV of the Ohio Constitution of 1912 which provides: "License to traffic in in-

1913.]

Meyer v. O'Dwyer et al.

toxicating liquors shall not be granted to any person who, at the time of making application therefor, is not a citizen of the United States and of good moral character," that that part of Section 28 of the aforesaid act of the General Assembly giving to county licensing boards the power to give preference to applicants engaged in the business prior to the fourth Monday in May, 1912, violates Sections 1 and 2 of Article I of the Bill of Rights of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States; that said act of the General Assembly in Sections 19 and 21 violates Section 1 of Article II of the Ohio Constitution.

The motion filed herein prays for an injunction on the grounds set out in the petition. The demurrer sets up three several grounds:

1st. That the plaintiff has not legal capacity to sue.

2d. That the court has no jurisdiction of the subject of the action.

3d. That the petition does not state facts which show a cause of action.

The demurrer was argued and submitted upon the third ground.

The petition in this case was filed November 7th, 1913; the motion for injunction November 10th, 1913; the demurrer to the petition November 13th, 1913. The cause was argued and submitted on the demurrer November 14th, 1913.

Counsel for plaintiff in argument contend that as the Constitution of 1912 provides that the traffic in intoxicating liquors shall be licensed and contains no mention of the evils arising from the traffic, that the policy of the state has been changed from that which obtained under the Constitution of 1851, and that the business of trafficking in intoxicating liquors is now no different from any other business, occupation or calling which it is necessary to regulate for the public good by license. They contend that the police power of the state which, under the Constitution of 1851, was unlimited and unrestricted in its dealings with the liquor question is now shorn and limited and brought within the constitutional restrictions and limitations that would

apply to such callings or occupations as the practice of medicine or dentistry, and that, therefore, any person in the state, if of good moral character, who complies with other requirements of the law, is entitled to a license. In other words, their claim is that there can be no constitutional or statutory limitations as to the number who may engage in the business.

No doubt that under the Constitution of 1802, any person might engage in the traffic of intoxicating liquors in Ohio until the passage of the act of 1831 (2 Swan & C., 1426) granting license to traffic in intoxicating liquors and regulating taverns, but after that date none but a licensee could engage in the traffic, so that the adoption of the license system is a limitation and a restraint upon the traffic. In the absence of a regulating act (a license system), the traffic is unrestrained, and that has been the experience of the people of Ohio under the Constitution of 1851, for, although the General Assembly had specific authority to pass laws to provide against the evils thereof the traffic grew and the evils multiplied, and the people adopted the Constitution of 1912 to restrain the traffic and not to give it greater liberty.

While it is true that under the Constitution of 1912 the General Assembly may not by direct act prohibit the sale, yet the people, by the amendment adopted September 3, 1912, have expressly retained in force existing local option laws, so-called, and by acting under these the people can extend the prohibition over the entire state, so it is clear that the effect of the constitutional amendment of September 3, 1912, was not to relieve the business of trafficking in intoxicating liquors from any burdens nor to put it on a footing with other callings or occupations and permit any person so inclined to enter the business without restraint, but rather to put more restrictions and burdens upon the business, and to restrict the number and class of persons who might engage in it. If there is a common or natural right in every citizen to engage in the liquor traffic, it is not granted, protected or vested by Section 9 of Article XV, but by Sections 1 and 2 of Article I, and as these provisions have been part of the Constitution since the admission of Ohio to the Union, the

1913.]

Meyer v. O'Dwyer et al.

people, in adopting the amendment of September 3, 1912, could not have contemplated granting a right which the Constitution recognized since the formation of the state.

Plaintiff contends that Section 9 of Article XV of the Ohio Constitution is in conflict with Section 1 of Article XIV, known as the Fourteenth Amendment to the Federal Constitution, in the provision which limits the number of saloons to one for every five hundred of population, and contends that in this the state denies to persons within its limits the equal protection of the law.

The question involved in this objection has been many times before the Supreme Court of the United States, and before the courts of last resort in many of the states, from the time of the decision in what is known as the "Slaughter House cases" in 15 Wallace, 36, down to the present date and the decisions have been uniform in establishing the rule that the states, in the legitimate exercise of their police power, are not hampered by any provision of the Federal Constitution, and, while there are numerous cases in which the action of the states are held to be in conflict with this Section 1 of Article XIV of the Federal Constitution, it will be found that in every such case the state was attempting, under the color of its police power, to do an act that was not warranted by such power.

Justice Miller, in the Slaughter House cases, *supra*, which were decided shortly after the adoption of the Fourteenth Amendment to the Federal Constitution, laid down the rule that the privileges and immunities of a citizen of the United States which the Federal Government assumed to protect under said Fourteenth Amendment were such only as such citizens theretofore had under the state constitutions. A citizen of a state could not, before the adoption of the Fourteenth Amendment, claim a right or privilege to enter into or remain in a business or calling which might affect injuriously the health, good order, good morals, peace or safety of society, and the Fourteenth Amendment does not guarantee them any such right, privilege or immunity. See Slaughter House cases (*supra*); *Bartemeyer v. Iowa*, 18 Wallace, 129.

In *Ohio, ex rel Lloyd, v. Dollison*, 194 U. S., 445, plaintiff in error complained that to make an act a crime in one territory and permit it outside such territory is to deny a citizen of the state the equal operation of the law. McKenna, J., says:

"The objection goes to the power of the state to pass a local option law which, we think, it not open to question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, 'the sale of liquor at retail may be absolutely prohibited by the state.'" *Cronin v. Adams*, 192 U. S., 108.

"That being so the power to prohibit it conditionally was asserted, and the local option laws of Texas are sustained." *Ripley v. Texas*, 193 U. S., 504.

"It is contended that the statute is void in that it deprives all coming within its provisions in the rights, liberty and property guaranteed by the Fourteenth Amendment to the Federal Constitution. It is scarcely necessary to say that if a statute is a legitimate exercise of the police power of the state for the protection of the health of the people and for the prevention of fraud, it is not inconsistent with that amendment, for it is a settled doctrine of this court that as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for these objects, and the Fourteenth Amendment was not designated to interfere with the exercise of that power by the state." *Powell v. State*, 127 U. S., 683.

This case is known as the oleomargarine case. It arose over a statute of the state of Pennsylvania prohibiting the manufacture and sale of oleomargarine within the state.

"The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which by the Fourteenth Amendment the states were forbidden to abridge. The state may authorize or refuse to authorize the sale of liquor on such terms as it thinks proper, and the courts of the United States have nothing to do with the exercise of this police power. The act of the Georgia Legislature called in question here provided that in territory outside corporate towns and villages the person desiring to engage in liquor traffic should apply to the ordinary of the county, who had power to grant or refuse such application. It is contended that the act discriminated in favor

1913.]

Meyer v. O'Dwyer et al.

of residents in corporate towns and villages, and that the discretion lodged in the ordinary was arbitrary in that it gave him power to reject applications without regard to the applicant's fitness or the propriety and merit of his application, while the ordinary had no such power to reject applications from incorporated towns and villages; that said act was in conflict with the Fourteenth Amendment to the Federal Constitution." *In re Hoover*, 30 Fed. Reporter, 51.

Held: The act within the police power of the state and that the Fourteenth Amendment had no application. Citing License cases, 5 Howard, 573; *Bartemeyer v. Iowa*, 18 Wallace, 129. Distinguishing: *Yick Wo v. Hopkins*, 118 U. S., 356.

This case was affirmed by the Federal Circuit Court for the Southern District of Georgia, Eastern Division, in *Ex rel Hoover v. Ronan*, 33 Fed. Reporter, 117.

"If the public safety or public morals required the discontinuance of any manufacture or traffic the hand of the Legislature could not be staid from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. The police power extends to the protection of the lives, health and property of the citizens and the preservation of good order and the public morals. These belong emphatically to that class of objects which demand the application of the maxim '*salus populi suprema lex*' and they are attained and provided for by such appropriate means as the legislative discretion may advise." *Beer Co. v. Mass.*, 97 U. S., 32.

"That power (police power) belonged to the states when the federal Constitution was adopted. They did not surrender it and they have it now. It extends to the entire property and business within their legal jurisdictions: both are subject to it in all proper cases." *Fertilizer Co. v. Hyde Park*, 97 U. S., 667.

"No Legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. Government is organized with a view to their preservation and can not divest itself of the power to provide for them. The supervision of the public health and the public morals is a governmental power continuing in its nature and

to be dealt with as the special exigencies of the moment may require. For this purpose the largest discretion is allowed and the discretion can not be parted with any more than the power itself." *Stone v. Mississippi*, 101 U. S., 814.

"No part of the federal Constitution abridges the right of the state to exercise its police powers for the protection of the health, morals, safety and well-being of its citizens when such power is honestly exercised to effect such purpose. It is only when the real object of the Legislature is not to protect or promote the general welfare, but is an attempt under the guise of police regulations to deprive a citizen or resident of his property or liberty without due process of law, that the Fourteenth Amendment to the Constitution of the United States may be invoked." *Mugler v. Kansas*, 123 U. S., 669.

"It is objected that the provisions of the law requiring an applicant to have the written approval of a majority of the board of police commissioners before the collector can issue a license is arbitrary and unreasonable, and the case of *Yick Wo v. Hopkins*, 118 U. S., 356, is cited in support of the objection. Whatever force this objection might have in reference to carrying on the ordinary avocations of life which are not supposed to have any injurious tendencies, it has no force in the present case. It is well settled that the state may prohibit the traffic in liquor altogether. (See *Mugler v. Kansas*, 123 U. S., 623.) And if it can prohibit the thing altogether it may impose such conditions upon its existence as it pleases." *Ex parte Christensen*, 85 Cal., 213.

The case of *Trageser v. Gray*, 73 Md., 250, takes up practically all the legal and constitutional questions raised in the case at bar. The court in that case reviews many cases decided by the Supreme Court of the United States on the constitutional questions raised here in support of its conclusions. It is a strong well-reasoned case and states the law as I conclude it to be after a careful consideration of all the cases cited by counsel on both sides of this case.

The state of Maryland had enacted a system for the regulation of the sale of intoxicating liquors in the city of Baltimore, and said act, in many of its provisions, is similar to the Ohio act under consideration. There a board was established con-

1913.]

Meyer v. O'Dwyer et al.

sisting of three commissioners invested with the power of granting licenses to sell liquor at retail. Applicants were required to file a petition with this board, setting forth a number of statements tending to show that they were fit persons to be licensed, which was required to be verified by affidavit. The act further provided that license to sell at retail should be granted only to citizens of the United States of temperate habits and good morals. The plaintiff who was not a citizen of the United States or of the city of Baltimore, but was a native of Prussia, applied for a license which was refused him. He applied for a writ of mandamus in the city court, and, after a hearing on demurrer, his petition was dismissed and brought into the Supreme Court on a writ of error. The sole question presented was whether the statute was a valid and constitutional enactment. The court said, among other things:

“Under every system of government there must be power in some of its departments to provide for the regulations of the internal affairs of the state. Public morals, public health, public order, peace and tranquillity are objects of cardinal importance to the well-being of society. Without the power to protect and preserve these interests civilized governments could not exist. The limits and extent of this power are somewhat vague and undefined. Private interests are frequently found in opposition to the public good and cases may doubtless arise in which it would be a matter of great difficulty and delicacy to settle with justice their conflicting pretensions.

“Every consideration connected with the public welfare imperatively demands it; it is a duty which the Legislature can not evade. Their power over the whole subject under the Constitution can not at this day be questioned. They may prohibit the sale of spirituous liquors entirely if they see fit to do so, or they may restrict it in any manner which their discretion may dictate. No one can claim as a right the power to sell either at any time or at any place or in any quantity. If he is allowed to sell under any circumstances it is simply by the free permission of the Legislature and on such terms as it sees fit to impose.

“It is, however, mentioned by the appellant that although this statute was passed apparently for the purpose of exercising this power it is in conflict with the Fourteenth Amendment because it denies to persons not citizens of the United States

the right to obtain a license to retail liquor and thereby makes unconstitutional discrimination against them."

The provision of the Fourteenth Amendment referred to is that which says that no state shall deny to any person within its jurisdiction the equal protection of the law.

"It could not be said that any man, alien or citizen, has a natural right to retail intoxicating liquors. According to *Bartemeyer v. Iowa*, 18 Wallace, 129, it is not one of the privileges and immunities of citizens of the United States. In *Mugler v. Kansas*, 123 U. S., 623, it was said that such a right did not inhere in citizenship, and that it could not be said that government interfered with or impaired anyone's constitutional right of liberty or property when it prohibited the manufacture and sale of intoxicating drinks.

"In *Kidd v. Pearson*s, 128 U. S., 1, the statute of Iowa prohibited the manufacture or sale of intoxicating liquors except for mechanical, medicinal, culinary and sacramental purposes, and any citizen of the state was permitted to manufacture or buy and sell for this purpose except hotel keepers, keepers of saloons, eating houses, grocery keepers, and confectioners. The Supreme Court decided that the statute did not in any way contravene any provision of the Fourteenth Amendment. We see that the privilege granted was confined to citizens of the state and that there was a discrimination against five classes of these citizens, but in truth the valid exercise of the police power does not depend on any question of discrimination for or against particular persons or classes of persons. It is confided to the wisdom of the Legislature to make such application of it as the public welfare may require.

"In the case of occupations which may become injurious to the community they may prohibit them altogether or they may permit them in certain localities and on certain terms and under certain restrictions or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not at all considered in the exercise of this power.

"And in this case (*Stone v. Miss.*, 101 U. S., 814) and subsequently in *Powell v. Pennsylvania*, 127 U. S., 684, it was shown that a statute enacted in good faith for the exercise of the police power could not be regarded as repugnant to the Fourteenth Amendment unless it had no real or substantial relation to the objects of such power.

"There are cases unquestionably in which discrimination against particular persons or classes of persons would be unlawful. They are indicated in *Powell v. Pennsylvania*, and in many other cases especially in the United States affecting the Legislature of California on the subject of Chinese. It is held that everyone had a right to pursue an ordinary calling on terms of equality with all other persons under similar circumstances—that is, a calling not in any way injurious or likely to become so. The statute now before us oppresses no one and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity; it subjects no one to penalties for its violation which are not imposed equally on all offenders.

"It does not, it is true, make an equal partition of the privilege of liquor selling among all classes of persons, but there is no warrant for supposing the legislative control over traffic must conform to any such standard; it is not crippled by any such restraint; it overrides all private interests and embraces the means which are necessary and proper to protect the public from the evils connected with the subject.

"Assuredly the Supreme Court did not consider this control as limited by the necessity of making an equal distribution of favors when it said in speaking of the trade in liquor and its consequences: 'The police power which is exclusive in the state is alone competent to the correction of these great evils and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' *Mugler v. Kansas*, 123 U. S., 659.

"It has been maintained that the appellant (Trageser) has rights under existing treaties which have been infringed by a denial of a license to aliens. Our opinion on this question has been sufficiently indicated, but a few words more may be added. If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that anyone, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of the state. Such power is original, inherent and exclusive: never been surrendered to the general government and never can be surrendered without impairing the existence of civil society."

The case of *Sedrow v. State of Wisconsin*, recently decided by the Supreme Court of that state, but not yet published in

any legal journal, but a copy of the decision which I have received from the Attorney-General of that state through Mr. Northup, of counsel for defendants, is in many points similar to the case at bar.

Some time prior to July, 1913, the exact date of the enactment not appearing in the opinion, the state of Wisconsin enacted a liquor regulation providing a limitation of the number of saloons to be one for every two hundred and fifty of the population and that those who were in business prior to June 30th, 1907, might remain in business, although this would increase the number allowed to any locality beyond the number provided for in the act, but that no additional licenses should be granted for such localities until after the number in business should be reduced below the number provided for in the act. The plaintiff in error was not engaged in the business on the 30th of June, 1907, nor was the place in which he was engaged at the time of his violation of the act entitled to a license.

The court sets out the claims of the plaintiff in error as follows:

“That the act regulating the traffic in providing for license is unconstitutional because it violates the Fourteenth Amendment of the Federal Constitution in that it denies to all the property owners within the city the equal protection of the law; that it creates a monopoly in favor of 2,234 places against 30,000 places in said city; that it discriminates in favor of 2,234 property owners in said city; that it is class legislation because it builds up a class and clothes the class with special privilege; that it deprives persons of their property without due process of law; that it is unreasonable because it confines the saloons to the identical places they occupied on the 30th of June, 1907; that it takes property without compensation.”

And the court says:

“The above objections to the constitutionality of the law urged by plaintiff in error are set forth in detail not for the purpose of separate treatment in the opinion but to show that they were raised and that none have been overlooked by the court. Whether all the rights therein claimed to attach to property or to persons are in fact rights or privileges which the Constitution or the law recognizes is needless to discuss or determine in this case, for it is established by the early decisions

1913.]

Meyer v. O'Dwyer et al.

of this court, as well as by other courts, that as respects the liquor traffic, the Legislature in the exercise of the police power has plenary authority to prohibit it altogether or to restrict it in any reasonable manner. The justification for the exercise of the police power in restraining or prohibiting the sale of intoxicating liquors has been stated and re-stated by the courts time and again. It may be summed up as resting upon the fundamental principle that society has an inherent right to protect itself; that the preservation of law and order is paramount to the rights of individuals or property in manufacturing or selling intoxicating liquors; that sobriety, health, peace, comfort and the happiness of society demand reasonable regulations if not entire prohibition of the liquor traffic in respect at least to drunkenness, poverty, lawlessness, vice and crime of almost every description. Against this result society has the inherent right to protection itself, a right which antedates all constitutions and written law, a right which springs out of every foundation upon which the social organism rests, a right which needs no other justification for its existence or exercise than that it is reasonably necessary in order to promote the general welfare of the state. It so happens that temporarily certain places or persons are given a preference or that rights theretofore enjoyed are limited or entirely destroyed. Such result does not affect the validity of the act. (*Mugler v. Kansas*, 123 U. S., 633.)

"The preferences created result from the effort to temporarily protect business that was established at the time the law went into effect."

The police power of the state is broad and comprehensive. Under it may be enacted laws that limit and interfere with what may be called natural inherent rights, among which is the business of preparing, handling and selling food, the business of plumbing, sanitary engineering, the business of operating machinery, attending steam boilers, manufacturing explosives, the professions of medicine, dentistry, pharmacy, and many other professions and occupations, and the class of cases which plaintiff has cited in support of his contention that the act in question is unconstitutional all come under one or the other of the subjects above enumerated, and no one of them is a case coming under any business or calling that may be entirely prohibited. It is admitted by counsel for the plaintiff, that the liquor traffic may be prohibited and entirely wiped out, but

the state, in the exercise of its police power, could not prohibit any of the occupations or callings above enumerated, but could only restrict or regulate them.

I am of the opinion that the cases heretofore cited dispose of all the points raised by the petition of the plaintiff in this case, especially the cases of *Trageser v. Gray* and *Zodrow v. Wisconsin*, with the possible exception of the question of the right to issue licenses to corporations. But the other objects raised will be noticed.

The second specific objection of plaintiff is that the licensing act violates Section 9 of Article 15 of the Constitution of 1912, in that it authorizes the granting of licenses to corporations. Said section provides as follows:

“License to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law, and municipal corporations shall be authorized by general laws to provide for the limitation of the number of saloons.”

These are the express grants made in this section. All other matters relating to the licensing of saloons are limitations. It is provided further in said section as follows:

“License to traffic in intoxicating liquors shall not be granted to any person who, at the time of making application therefor, is not a citizen of the United States and of good moral character.”

It is conceded that the word “person” as here used refers to a natural person. It is also conceded that a corporation whether organized under the laws of this state or of any other state, is not a citizen of the United States. And it is needless to say that the corporate entity, as such entity, can have no character, either good or bad.

Plaintiff contends that because of this limitation the licensing act authorizing licenses to be issued to corporations is unconstitutional.

Section 1 of Article II of the Constitution of 1912 provides that:

1913.]

Meyer v. O'Dwyer et al.

"The legislative power of this state shall be vested in a General Assembly consisting of a Senate and a House of Representatives, but the people reserve to themselves the power to propose," etc.

It has long been the established rule of construction in this state that the Legislature has full power to enact any and all necessary legislation, unless it is restricted by some part of the Constitution. In other words, it has all power not prohibited to it by the Constitution.

"It is not that the legislative power as conferred in the Constitution shall be vested in the General Assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purpose of the state government may require, and we must look to other provisions of the Constitution to see how far and to what extent legislative discretion is qualified or restricted." *Baker v. Cincinnati*, 11 O. S., 534; *State v. Guilbert*, 70 O. S., 252.

"Therefore, when the power of the General Assembly to enact such a law is drawn into question the proper inquiry is whether such an exercise of legislative power is clearly prohibited by the Constitution." *Baker v. Cincinnati*, 11 O. S., 534.

"Such prohibition must either be found in express terms or be clearly inferable by necessary implication from the language of the instrument when fairly construed according to its manifest spirit and meaning." *Cass v. Dillon*, 2 O. S., 607; *Lehmann v. McBride*, 15 O. S., 592.

The limitation contained in Section 9 of Article XV, denying license to persons who are not citizens of the United States and of good moral character, in my opinion is not a clear prohibition preventing the Legislature from enacting a law licensing corporations in the liquor traffic, nor, in my opinion, would such a prohibition arise by implication from this section, and I fail to find in any section of the Constitution anything that might be a prohibition of this act.

The Legislature has in enacting this law placed this construction upon said Section 9 of Article XV, and I can see no reason for overruling such a construction.

It is argued that a corporation can not be imprisoned for a violation of the act. The fact that the Legislature might fail to prescribe a penalty for a violation of the act does not affect, in any way, the question of its constitutional power to pass the act, and, as a corporation in selling liquor, either legally or illegally, must act through an agent, the agent who makes the illegal sale may be punished under the provisions of the present act.

It is contended again that the license act violates Sections 1 and 2 of Article I of the Ohio Constitution in giving preference to those engaged in the business prior to May, 1912. I think this objection has been met by the opinion heretofore announced, but it will be noticed further.

Plaintiff should not be heard to complain of this provision for no injury has been done to him, as he was one of the favored ones. He alleges in his petition that he was in business prior to the date mentioned, and, as no injury was done to him by this alleged unconstitutional provision, he would have no standing in court to enable him to test its constitutionality. But is it unconstitutional?

The Bill of Rights guarantees to no one rights, privileges or immunities which may conflict with the exercise of the police power. The people might have prohibited the traffic; they limited it instead to one person in every five hundred. All who engaged in the traffic after the Constitution of 1851 did so at their peril. It was not recognized as a lawful business, but the Legislature, desiring to save to dealers as much as possible, and while empowered by the Constitution to issue but a limited number of licenses, did what it could to protect investments theretofore made. Plaintiff being among the favored number could not complain. One not in business prior to May, 1912, could not complain, for no right or immunity was taken from him; it could, therefore, be but a moot question which the court would not entertain.

Again this objection may be answered by calling attention to the following schedule to the several amendments submitted and adopted September 3d, 1912, which provides among other things the following:

1913.]

Meyer v. O'Dwyer et al.

“Any provision of the amendments passed and submitted by this convention and adopted by the electors, inconsistent with, or in conflict with, any provision of the present Constitution, shall be held to prevail.”

And I might further say that the right of the people to protect and defend their health, morals and safety existed before Constitutions and is a paramount right and one which the people can not surrender.

The Supreme Court of Ohio, in *Addler v. Whitbeck*, 44 O. S., 574, say:

“It is averred that from a long time prior to the enactment of this law the plaintiffs have been engaged in the trafficking of intoxicating liquors and have had a large amount of property invested in the business, and it is claimed that the law could not be made applicable to them without impairing vested rights. The claim is not tenable; it would subvert the power to provide against the evils of the traffic and place it superior to any regulation whatever. The provisions of Section 9 of Article XV of the Constitution have stood since its adoption as a perpetual admonition to all persons engaging in the traffic that in doing so they place their property invested in the business subject to the power of the General Assembly to provide against the evils resulting from the traffic. The same argument was made in *Miller v. State*, 3 O. S., 475, against the act of 1854, prohibiting among other things the sale of liquor to be drunk upon the premises where sold; but it met with no favor in the court. The law was held valid. (See opinion of Thurman, J., in the case.)

“No prescriptive right can be claimed by persons engaged in the whiskey traffic against the exercise of its functions by the Legislature of the state. It was said by Taney, C. J., in the License cases, 5 Howard (U. S.), 577: ‘If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper.’”

Another objection raised by the petition is that the licensing act violates Section 1 of Article II of the Ohio Constitution. This refers to the power given county licensing boards, by

Section 19, to determine the moral character of applicants, and by Section 21 to require certain information to be furnished by applicants under oath. I fail to find any legislative power conferred by Section 21, and as counsel has presented no argument in support of plaintiff's contention in this respect this objection will not be further noticed.

Does Section 19 grant legislative power? In support of the claim that it does plaintiff has cited but one case, that of *Harmon v. State*, 66 O. S., 249.

This case does not, in my opinion, lay down any such rule. And the decision does not show any intent on the part of the court to hold that the authority given by a number of the statutes to boards appointed to pass upon the qualifications of applicants to practice the learned professions such as law, medicine, dentistry, teaching and the like, is a delegation of legal power. However, the question in my opinion, is settled against the plaintiff's contention by the case of *Theobald v. State*, 10 C.C.(N.S.), 536.

The court is, therefore, of the opinion that the demurrer to the petition should be sustained; and the same is sustained and the petition dismissed. Plaintiff excepts. Plaintiff, not desiring to plead further, it is ordered that defendants have judgment for their costs. Plaintiff excepts. Plaintiff gives notice of appeal; bond on appeal fixed in the sum of \$200.

1913.]

State v. Guaranty Co.

**COMPLETION OF A STATE ARMORY BY THE SURETY
OF THE CONTRACTOR.**

Common Pleas Court of Clermont County.

STATE OF OHIO V. THE CITIZENS TRUST & GUARANTY COMPANY
OF WEST VIRGINIA ET AL.

Decided, October Term, 1913.

*Sovereignty of the State Waived in a Civil Proceeding, When—
Mechanic's Lien Void as Against Property of the State—Rights of
a Surety Who Completes Work Abandoned by a Contractor—Sec-
tions 5257, et seq.*

1. Where a state goes into court to ask protection as to claims which are being asserted against its property, the immunity of a sovereign is voluntarily waived.
2. A mechanic's lien filed on property belonging to the state is void, and it follows that a proceeding does not lie to subject funds in the hands of the state to payment of claims for work and material which went into a state building under a contract which was abandoned before completion.
3. Where work on a state building is abandoned by the contractor and the contract is completed by his surety, the amount remaining due under the contract is payable to the surety, and can not be reached by creditors of the derelict contractors who hold claims incurred by him for work and material which went into the building.

*Pogue, Hoffheimer & Pogue and D. W. Murphy, for the Citi-
zens Trust & Guaranty Co.,**Griffith & Nichols, for Ferris.**Eli H. Speidel, for Keen & Bro.**Chas. M. Leslie, for Moores-Coney Company.**W. F. Roudebush, Samuel Sprague, N. G. Cover and Louis
Hicks, for other liens.*

DAVIS, J.

The armory board of state of Ohio, under Sections 5257, et seq., contracted with J. H. L. Barr to build an armory at Batavia. Barr executed a bond in the sum of \$9,000 conditioned for the faithful performance of the contract, the Citizens

Trust & Guaranty Company of West Virginia being the surety on the bond. On November 12th, 1912, Barr died, leaving the armory uncompleted. Barr's administrator declined to complete the contract, the state notified the bonding company and thereupon the company took charge and completed the armory. The contract price for the entire work was \$17,860; there had been paid Barr \$10,288, leaving in the hands of the armory board \$7,572. The bonding company expended in completing the building \$3,983.31, and at Barr's death there was due corporations, firms and individuals, for material, labor, etc., \$6,677.08, this sum being due the defendants who have filed answers and cross-petitions in this case, and due for material, etc., furnished Barr and used in constructing the armory. There is no dispute as to the correctness, justice and amount of any claim. The contract provides for payment of 80% as the work progresses. A number of claimants filed proof of claim with armory board and filed mechanic's liens after Barr's death. When the building was completed, there being many claimants of the fund in the hands of the armory board, the Attorney-General commenced this action and bringing the fund into court makes all claimants parties, and asks the court to decide as to conflicting claims and distribute the fund. An examination of pleadings discloses the fact that in addition to the material and labor furnished by the bonding company, some of the other defendants also furnished material, which was furnished and used after Barr's death, as will appear by examination of account of Geo. A. Keen & Brother and Chas. Ferris.

It was insisted in argument by counsel for the bonding company that the state can not be sued, nor can any lien be acquired on the armory building, or on funds in hands of armory board.

It is so well settled by numerous decisions of the Supreme Court of the United States and of this state, that the state is sovereign and can not without its consent be sued, that it is unnecessary to cite cases on this point. Were this question in issue in this case, it would be disastrous to the bonding company and defeat not only all other creditors but the bonding company

1913.]

State v. Guaranty Co.

as well. It would be a boomerang used by the company for it, as well as all other defendants, by cross-petition sue the state by laying claim to the fund. The bonding company can not urge a defense for the state, which the state does not claim. The right to plead immunity from suit, is a personal right, to be asserted, if at all, when the state is sued, by the state. "The state is not bound by a general statute, but the exemption is a privilege of sovereignty and can be asserted only on behalf of sovereignty" (56 O. S., 175). But in this case the state has commenced the action, has filed the petition, and it is held in *State v. Executor Butties*, 3 O. S., 309, "When the state appears in her courts as a suitor to enforce her rights of property, she comes shorn of her attributes of sovereignty as a body politic, capable of contracting, suing and holding property subject to those rules of justice and right which in her sovereign capacity she has prescribed for the government of her people." The 3d O. S., 309, has been approved in several cases, the last being *Railroad Co. v. State*, 85 O. S., 295. It is true that in this case the state is not trying "to enforce her rights of property," but she is asking protection, and subjects herself to this suit, and voluntarily waives the immunity of a sovereign."

The holding of court in *Ohio v. Morrow*, 10 N.P.(N.S.), 279, that the state can not be sued is true, but only in cases where a suit is brought against the state, and the state interposes the defense of sovereignty. Does it follow that, as the state can not without its consent be sued, no mechanic's lien can be taken on buildings erected by the state, or on the fund? This point is decided in *State, ex rel, v. Morrow et al*, 10 N.P.(N.S.), 279. That case was an action of mandamus, and counsel claim that was the only question necessary to be decided, and in fact the only point on which the case is any authority, but Judge Kyle after disposing of question of mandamus, says: "There is a second question, more difficult of solution, and that is by the steps taken by the relator did it acquire any lien on the fund, or in other words, does the lien law apply in a case where the state of Ohio is party"? The opinion of Judge Kyle is a very clear one, and has been affirmed by the circuit court. On page

284 he says, "There is no express provision or necessary implication that the state is included within the lien act, and therefore the mechanic's lien law does not apply to the state." The mechanic's lien law is a general statute and the state is not bound by a general statute (56 O. S., 175). The circuit court in affirming Judge Kyle, in 10 N.P.(N.S.), in a note on p. 279—cites a case in 38 Law Bulletin, 212, *Regg v. Mann*, a case affirmed by Supreme Court without report. In that case the facts found and stated, are:

"Mann entered into a contract with Hill to construct a dwelling; Regg, a sub-contractor, agreed to do the brick work; Mann was aware of this sub-contract. Hill, the principal, abandoned the job when the work was about half done; Regg, having nearly completed his sub-contract for brick work, was willing and prepared to go on and complete his sub-contract. There was due Regg, on his sub-contract, when Hill abandoned the job, \$122. The owner, Mann, had paid Hill \$1,375 on the contract, and had he completed the work there would have been due the additional sum of \$1,233. Mann advertised for bids to complete the work, but he rejected all bids and personally completed the dwelling, and the whole cost, including amount paid principal contractor, was \$109.84 less than original contract price. Regg, the sub-contractor, filed with the owner an itemized statement of his claim under mechanic's lien law. The circuit court as conclusion of the law found, (1) the contract was entire and Hill, the principal contractor, forfeited all his rights when he abandoned the contract; (2) that this abandonment worked a forfeiture against the plaintiff as sub-contractor, and that the mechanic's lien law could not afford plaintiff any remedy."

It is urged that Sections 8324 and 8325, General Code, part of the mechanic's lien law, are broad enough to include either the state or the armory board, and this is true if the words "or other public buildings provided for in a contract between the owner, or the board officer, or public authority" would include an armory, and the clause authorizing sub-contractors to file with the owner, board officer or public authority, an itemized statement, would give a sub-contractor a right to a lien on the fund. The mechanic's lien sections of General Code, are general laws,

1913.]

State v. Guaranty Co.

and from such laws the state is exempt (56 O. S., 175), and in *State, ex rel, v. Morrow*, 10 N.P.(N.S.), the statutes are quoted and said not to apply to the state. That case, as said, was affirmed by the circuit court, and so far as I can find has not been overruled, and that case decides that neither a lien on the building nor on the fund can be acquired under the lien law, and it would be singular that a lien on either the building or the fund could be taken when no action could be prosecuted against the state to enforce the lien. The amendments to the Constitution adopted in 1912, amend Article I, Section 16, of the Bill of Rights, and authorizes the Legislature to pass laws which will permit suits to be prosecuted against the state, but as yet no such law has been enacted, so that if a lien could be taken, no suit could be maintained to enforce it, unless the state waived its sovereignty, and if it be claimed that by entering this suit, the state waived sovereignty, and recognized a lien, then the case of *Regg v. Mann*, 38 L. B., 212, applies. "That this abandonment (by Barr) worked a forfeiture against the plaintiff as sub-contractor, and the mechanic's lien law could not afford a remedy." Opinions of the Attorney-General have been submitted in which he holds that no lien can be taken on buildings erected by the state, and counsel have submitted briefs, citing many cases, showing that such is the law in states where like statutes have been construed. The liens set out in the answers and cross-petitions in this case, being on the property of the state are void, and being void, no lien on the fund can be sustained by virtue of any proceeding authorized by lien laws whereby to subject funds in hands of state.

The question then remains: does the bond given by the bonding company, for the faithful performance of the contract of Barr, require the bonding company to complete the building at its own expense, and prevent it receiving any money out of the fund in hands of armory board, retained under the law, and the contract?

It is claimed that the statute authorizing building of an armory, Section 5253, *et seq.*, General Code, makes the bonding company liable to complete the building, and does not give the

company any right to the money unpaid and retained by the state. Section 5259 is the section relied on in support of this claim. It provides:

"After the bid is accepted the board shall cause a contract and bond to be prepared between its members, as representatives of the state of Ohio, and the contractor. Such contract and bond shall be prepared by the Attorney-General, and provide for the completion of the armory and the protection of the state for the pay of material and employees. It may provide for payment from time to time, in the manner therein specified, but in no case shall the advance payment exceed eighty per cent. of the bid. In case of default upon the contract, the board may sue on the bond and advertise for other bids for the completion of the work."

This being a bond prescribed by law and a contract made in pursuance to statute, the statute must read as a part of the contract (*Secrest et al v. Harbee et al*, 17 O. S., 430; *Sorg v. Pike*, 27 O. S., 506). The bond is for protection of the state, not for anyone else, and when the armory is completed, the contract is carried out and no cause of action can accrue on the bond. The state has not bought or become liable for any material entering onto the building, nor has the state paid or become liable to pay any employee on account of this building. When Barr died the work was nearly 80% completed. His administrator refused to complete the work, and had the bonding company declined, then the state, under law and by express provision of Article 5 of the contract, could provide labor and materials to finish the work and deduct the cost thereof from any money then due and thereafter to become due to Barr, or the state might have re-let the unfinished portion of the work, and if it had not sufficient funds remaining unpaid, it would have a right of action against the bonding company for any deficit. The bonding company, as to creditors of Barr, did not assume to pay his debts, and the fact that the debt was incurred for material that was used in the building did not, nor does it, make a bond simply that a contract shall be carried out liable for any debt of contractor. The state held a double security; it was required to retain at least 20% of the contract price un-

1913.]

State v. Guaranty Co.

til completion of armory, and if this was not sufficient then, it held a bond. Stress is laid on Article 9 of the contract: "If at any time there should be evidence of liens or claims, which, if established, the owner of said premises might become liable and which is chargeable to the contractor, the owner shall have a right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him (in this case the state) against such liens or claims." As there can be no lien or claim on the fund against the state, this article would seem to be of little, if any, value or force. The law required the state to hold back 20%, and had Barr completed the contract and been in debt for labor or material, neither the state nor the bonding company would have been liable for such debts, and the 20% would have been payable to Barr.

Article 9 of the contract authorizes the state to retain out of any payment due or to become due to Barr, an amount sufficient to indemnify the *state* against any lien or claim. There was no lien or claim against the state at the time of Barr's death; the administrator refusing to complete the contract, nothing further could be due or become due to Barr. How then, could any debt, lien or claim for past labor or material for Barr be paid out of money not due at his death, and never earned or due him or his estate? In the case of *Village of Pt. Clinton v. Cleveland Stone Company*, 10 C. C., 1, it is held:

"Where a contract for street improvement provided payments should be made the contractor as the work progresses, on estimates of city engineer, 85%, and 15%, to be paid on completion of the work, the contractor abandoned the contract and his sureties completed the contract in order to save themselves, the sureties are entitled to the 15% remaining unpaid as against the lienholders."

The facts in the case show that the principal contractor abandoned his work; that up to the time no estimates had been made him; that it afterwards was estimated that he had performed \$2,414.48 worth of work; the sureties completed the work, the village paid the sureties the 15%, and it seems that no one questioned the duty or right of the village to pay the

sureties the 15% for work done by them in completing the contract, but the dispute was whether in addition to the 15% the sureties could share in the money which was estimated to be due Sullivan at the time he abandoned the work. The circuit court refers to another case similar to the one under consideration, in which that court had before decided and held that the sureties were entitled to share to the extent of 15% in the fund in addition to what they had received for completing the work.

The circuit court of this first circuit, in case of *Peal & Bro. v. Board of Education*, 12 C. C., 266, an attachment and garnishee case, held:

"That when the sureties complete a job, which had been abandoned by the principal, the sureties are entitled to the monies coming due thereafter on the work, and no liens can attach thereto for a debt due from the principal contractor."

The authorities cited in brief of counsel for the bonding company are all to the effect that where a contractor abandons his work, the unearned portion of the fund applicable to the completed contract is to the extent that a surety has been compelled to expend money to complete the work, the money of the surety.

The bond in this case does not bind the sureties to do any thing except to see that Barr completes the contract. At Barr's death the contract was uncompleted and abandoned; nothing further could by any possible means become due to Barr. Had the state re-let the unfinished work, the 20%, and more if needed, would have been used, and the creditors could not have received any portion of it. It is difficult to see how the bonding company, as surety, by completing the work earned money for the creditors of Barr. Why as to this fund as to other creditors, does the bonding company occupy any other position than any other person.

"Sureties are never visited with penalties and their liability is never extended beyond the strict letter of the obligation into which they have entered." *State of Ohio v. Cutting*, 2 O. S., 1; *Smith v. Huseman*, 30 O. S., 662.

The answer and cross-petition of Keen & Bro., and Ferris, show that a small portion of the material set out in their respec-

1913.]

Crawley v. Traction Co.

tive bills was furnished after the death of Barr and used in the building. I am unable to determine from the pleadings whether any other of defendants furnished material used in the building after Barr's death.

The fund will be distributed as follows:

The claim of the bonding company to be paid in full and out of the amount due it, the costs of this action are to be taken.

To Keen & Brother, and Ferris, the amount shown to be due them for material furnished and used after November 12th, the date of the death of Barr; the balance of the fund is to be distributed *pro rata* among all claimants.

COMPROMISE AGREEMENT AN ACCOUNT OF INJURIES.

Common Pleas Court of Licking County. *

MARY A. CRAWLEY v. THE INDIANA, COLUMBUS & EASTERN
TRACTION CO.

Decided, 1912.

Tender—Necessary of Sum Received in Settlement of Claim for Personal Injuries—Before an Action for Such Injuries Can be Maintained.

Where a compromise settlement has been made between an injured person and the party causing the injuries, the latter denying any liability but expressing a willingness to pay something to get rid of the matter, suit can not afterward be maintained by the injured person for damages on account of alleged negligence in causing the injuries, without first making a tender to the defendant of the amount theretofore received by way of settlement.

Smythe & Smythe and J. M. Swartz, for plaintiff.

J. E. Fitzgibbon and Durbin & King, contra.

SEWARD, J. (orally).

This case is submitted upon a general demurrer to the reply. This is a suit brought to recover damages for negligence alleged to have been committed by the defendant company by which the plaintiff sustained certain injuries. The defendant sets up an acquittance and receipt given by her in full of any damages she may have sustained. The plaintiff files a reply and says that

she admits that they paid her one hundred and fifty dollars, and says that she accepted that under a fraudulent misrepresentation of the agent of the company, who paid her the one hundred and fifty dollars. She says that this gentleman came to her without any request or solicitation on her part and she says:

"She was approached by said defendants and offered by said defendants for payment for the injuries inflicted upon her as stated in said petition, the sum of \$150; and said defendants made false and fraudulent statements to her at the time in regard to her physical condition and the condition of her unborn child, said defendants falsely and fraudulently stating and insisting that no injury had been done to her unborn child; if said child had been injured in anyway, miscarriage would have taken place before time of the offer, and made other false and fraudulent statements in regard to the extent of the physical injury to the plaintiff."

Now, the question is whether those statements made by the agent of the company were such statements that you could have determined the truth or falsity of them, or not. I think that matter is fully settled in the 33d Ohio State at page 283, the case of *Etna Insurance Company v. Reid*. Reid lived in Paulding county and was in the mercantile business. He procured one policy of insurance for seventeen hundred dollars and another, called an addenda, for one thousand dollars, making twenty-seven hundred dollars. He had a loss sometime in February, 1873. The agent, Mr. Rice, called upon him. They went to Paulding together. Rice told him in the office that he had no claim against the company and that he could go out and consult a lawyer and that the lawyer would tell him that he had, and put expense on him. That if he sued, they would take it to the United States court and make it very expensive for him, and that he had better settle the matter, and would give him one hundred dollars. Reid accepted the one hundred dollars in full satisfaction of any claim that he had. Afterwards he consulted a lawyer and the lawyer told him that he had a good case. He brought suit. The defendant set up the suit and acquittance, and it was alleged in the reply, or one of the pleadings at any rate—probably in the

petition—that this was fraudulently procured from him and set up the statement that was made by Rice to him in order to procure the receipt, and make a settlement such as was made. The Supreme Court say in the syllabus:

“2. An action will lie for a false representation of a material fact, whether the party making it knew it to be false or not, if he had no reason to believe it to be true, when made, and it was done with the intention of inducing the person to whom made to act upon it, and the latter does so, sustaining a damage in consequence.

“3. Where an agent of an insurance company makes representations to one having a claim for a loss against the company, the parties standing in antagonistic relations [the agent of this company was in an antagonistic relation to the plaintiff in this case. She could not help but know that he was antagonistic because he represented the defendant company], that the latter had no claim or rights that he could enforce by legal proceedings, such representations are only opinion—representations upon which he had no right to rely; and if he does so rely, it must be at his own risk, because the truth or falsehood of such representations could be ascertained by ordinary diligence.”

The Supreme Court in their opinion say:

“But it is not every erroneous representation that will avoid a contract. To have that effect it must be as to a fact material in the transaction, not mere opinion. It must be a representation of a material matter upon which the party, whom it affects injuriously, had a right to rely and did rely. If the representation be mere matter of opinion, or of fact equally within the knowledge of both parties, or one upon which the party had no right to rely, the representations, though acted upon, will not vitiate the transaction.”

This suit was brought without any tender being made of the \$100 that was received in settlement of the case. The Supreme Court has certainly held in the 69th Ohio State, at page 294, that that kind of an action can not be maintained—that the person who receives money in settlement of a claim must put the other in *statu quo*; that he must return the money before he plants his suit; that he can not eat his cake and have it at the same time. In this case of *The Manhattan Life Insurance Company v. Burke*:

“Where at the time of a compromise of a claim founded on a contract of life insurance, a dispute exists between the parties as to the liability of the company in any sum whatever, it denying that anything is owing, and an amount less than the claim is paid to the claimant in settlement of the controversy, and he executes a full acquittance and release, and surrenders the policy, an action at law on the policy can not be maintained without a return or a tender of the amount received, even though the party’s assent to the settlement was obtained by the fraudulent representations of the other party, the amount received as the settlement is in the petition credited as a payment on the policy.”

It is claimed as against this 69th Ohio State that she only received a part of what was already due. But the company does not admit that. They do not admit that anything was due. They simply gave her that by way of compromise or settlement of the claim. The court thinks that the demurrer to the reply is well taken, and it ought to be sustained, and it is so ordered.

1913.]

Realty Co. v. Rockefeller et al.

**TECHNICAL BREACHES OF LEASE NOT WARRANTING
A FORFEITURE.**

Common Pleas Court of Cuyahoga County.

**THE KOBLITZ BROTHERS REALTY COMPANY V. JOHN D. ROCKE-
FELLER ET AL.**

Decided, December 16, 1913.

*Landlord and Tenant—Relief Against Forfeiture of Lease—May be
Granted by Court of Equity—Where Not Willful or the Result of
Gross Negligence—Construction of Lease with Reference to Erec-
tion of a New Building—Failure to Record Assignment of Lease—
Insurance Rendered Invalid Thereby.*

1. Under the lease in question, the obligation on the part of the lessees to erect a new building could arise only in case they should elect to exercise the privilege so to do, and the lessor as a condition precedent should give his written consent thereto; and the right to forfeit the lease for breach of such a condition does not exist, notwithstanding an attempt appears to have been made in a negative clause in a subsequent paragraph of the lease to convert this privilege into a positive duty.
2. The breach complained of, in respect to the failure to record the assignment of the lease for a long period after it had been made, was ultimately cured by compliance with the condition of the lease so to do, and the lessor was thus saved from any prejudice resulting therefrom; and where it appears that the lessees and their assigns have paid rent for ten years to the amount of \$60,000, together with taxes, assessments and all charges, and have also made improvements on the property to the extent of \$10,000 or \$12,000, and the lessor has suffered no prejudice from the technical breach of the lease through failure to record an assignment thereof within a reasonable time, the lessees and their assigns will be relieved therefrom.
3. So also with reference to a breach of a condition of the lease that the premises shall be kept insured, where it appears that the insurance was rendered invalid for a considerable period through failure to secure the consent of the insurance companies to the assignment which had been made of the lease, relief will be granted to the lessees and their assigns, upon its being shown that the invalidating of the insurance was clearly due to inadvertence and that the premiums on the insurance policies had been regularly paid during the intervening period.

Milton S. Koblitz, Frank C. Scott and Hole & Hole, for plaintiff.

Holding, Masten, Duncan & Leckie, for the Abeyton Realty Co.

NEFF, J.

On the 15th day of September, 1903, defendants, John D. Rockefeller and Laura S. Rockefeller, executed and delivered to Joseph Koblitz and Lewis Koblitz a lease for a term of ninety-nine years from and after the 1st day of October, 1903, upon premises adjoining the corner of Superior avenue and what was formerly known as Bank street in the city of Cleveland, on what has, during the course of the trial, been called the Weddell House property. Subsequently the fee of the property was conveyed by John D. and Laura S. Rockefeller to John D. Rockefeller, Jr., and by him to the Abeyton Realty Company, a corporation, which now owns and holds the title to the property in question and is the owner and holder of the lease.

Joseph and Lewis Koblitz entered into possession of said premises, and on the 27th day of April, 1909, Joseph and Lewis Koblitz assigned said lease to the plaintiff, a corporation.

On the 2d day of October, 1913, Clarence E. Terrell, assuming to act for the Abeyton Realty Company, took forcible possession of a part of the premises in question, that is to say, took actual possession of a store-room upon said premises, and undertook to, and in a measure did, take forcible possession of the entire premises. Thereupon the plaintiff filed its petition in this action, praying that the defendants be enjoined from interfering with plaintiff in its occupation of said premises, and praying also that its title to said premises be quieted. There is also coupled with this specific prayer, a prayer for such other and further relief as plaintiff may be entitled to in the premises.

The right of re-entry, as effected or attempted by the defendant, the Abeyton Realty Company, is predicated upon the claim that the provisions of said lease require the lessees and their assigns to erect upon said premises, within the first period of ten years, a building costing not less than \$150,000. It is conceded

1913.]

Realty Co. v. Rockefeller et al.

that no such building or no building whatever has been erected by the original lessees or by their assignee, the plaintiff; so that, if the lease in question properly construed, imposed an obligation upon the original lessees, or their assignee, the plaintiff, to erect such a building, there has been a distinct and substantial breach of the condition of such lease which would entitle the defendant, the Abeyton Realty Company, proper election being made in that behalf, to avoid the lease and to enter and take possession of the premises.

The terms of the lease relating to the subject of the erection of a new building upon the premises referred to are as follows:

“And it is further mutually agreed and understood between the said lessor and the said lessees that said lessees shall have and are hereby granted the right and privilege at any time they see fit to repair or remodel the building and improvements now upon said premises at their own expense, provided, however, that said changes, remodeling and improvements on said land shall not impair or lessen the present value of the buildings and improvements now thereon. And said lessees shall have and are hereby granted the right and privilege at any time they may see fit to remove or destroy the buildings and improvements now upon said premises or any part thereof, but only on condition that said lessees will proceed without delay thereafter to erect in their place and stead and at their own expense a new building or buildings and improvements upon said premises, to cost not less than one hundred and fifty thousand dollars (\$150,000). Provided, however, that said lessees shall not exercise such right without having first obtained the lessor's consent in writing for the removal of said buildings or any part thereof, and furnishing and delivering to the said lessor a good and sufficient bond to said lessor's satisfaction to secure the erection of a new building or buildings and improvements on said land to cost not less than one hundred and fifty thousand dollars (\$150,000).

“But in case the lessees shall fail to erect a first class, modern building not less than eight stories in height upon said premises costing not less than one hundred and fifty thousand dollars by or before the expiration of said first period of ten years, i. e., by or before October 1st, 1913, it shall then be optional with the lessor to terminate this lease at that time by giving written notice to said lessees of his election so to do, or to continue the same in force without regard to the erection of such

new building. If this lease shall be terminated by the election of said lessor on or before October 1st, 1913, on account of the failure of said lessees to erect new building and improvements upon said premises before said date at a cost of not less than \$150,000 as aforesaid, then and in that event all the buildings and improvements upon said premises shall revert to and remain the property of the lessor without compensation therefor to said lessees."

Of course the controlling consideration is the intent of the parties to the instrument. That intent is evidenced by the language of the instrument. A well-accepted canon of construction is, that if it is practicable, such construction shall be given to a written instrument as will give effect to all of its terms; and, in relation to leases, it is settled by an almost uniform current of authority that if the construction of a lease be doubtful, courts will give to such lease such construction as will avoid a forfeiture, rather than one that will compel a forfeiture.

It is contended by the defendants that the provisions of the lease, in respect to the erection of a new building, impose upon the lessees and upon their assignee a duty to erect a building, such a one as described in the lease, within the term of ten years after the execution and delivery of the lease.

It is contended by the plaintiff that, in this respect, the lease imposed no such duty upon the original lessees or their assignee, the plaintiff; and that there is no obligation created by the provisions of the lease to erect the building, unless the original lessees or their assignee, the plaintiff, should exercise the privilege of tearing down the building for the purpose of erecting a new building; that the obligation to build a new building is contingent upon the exercise of the privilege upon the part of the original lessees or the plaintiff, their assignee, to tear down the building on the premises at the time of the execution and delivery of the lease.

The first clause of the language quoted gives the lessees the right and privilege, at any time they see fit, to repair or remodel buildings now on the premises, conditioned only that the present value of the buildings shall not be lessened. The privi-

lege or right conferred by this clause would seem to cover the full term or ninety-nine years, that is, there is no language in this clause itself that would seem to restrict its operation to the first ten years of the lease, or to any part of such term less than the full term of the lease.

The next clause gives the lessees the right and privilege, at any time they see fit, to remove or destroy the buildings on the leased premises, on condition that the lessees shall proceed without delay to erect, in place of the buildings so removed or destroyed, a building to cost not less than one hundred and fifty thousand dollars. Such right or privilege can not be exercised without the written consent of the lessor, and the giving by the lessees of a good and sufficient bond, to the satisfaction of the lessor, to secure the erection of such building. There is also in this clause no suggestion that this language is to be limited to any portion of the term of the lease less than the entire term.

The foregoing clauses impose no obligation upon the lessees to erect a new building. They do not agree to erect a new building. The obligation to erect a new building would arise only in case they should elect to exercise the privilege so to do, and written consent of the lessor should be given thereto in writing, as a condition precedent. If written consent is withheld by the lessor, the old building could not be removed, and of course no new building could be erected. This clause confers a privilege on the lessees and does not define a duty. To declare a duty, and yet to give the lessor the right to defeat the discharge of the duty, at its option, would be illogical in the extreme. The lessor could not be compelled to give written consent. In this respect the lessees are at the mercy of the lessor.

If an obligation to erect a building in ten years is created by the lease, and if a breach of such obligation would entitle the lessor to void the lease, then it would be within the power of the lessor, by withholding written consent, to reduce the term of the lease from ninety-nine years to ten years.

It should be observed that the next paragraph begins with the word "but." This word would serve to connect the two paragraphs, and in effect make the meaning of the second

paragraph the same as if the word "dollars" were followed by a semi-colon instead of a period. There is no affirmative agreement on the part of the lessees to erect an eight-story building. The reference to an eight-story building is stated negatively, and this clause provides what shall occur if the lessees shall fail to erect a building. As I have already indicated, if this contention be correct, then the lessor could convert the lease from ninety-nine years to a ten year lease by simply refusing to consent in writing to the removal or destruction of the building on the premises at the time of the execution of the lease.

This negative clause, or second paragraph, attempts to convert a privilege of the lessees into a positive duty. If the parties had contemplated that the lessees should be bound to erect an eight-story building, costing not less than \$150,000, within the first ten years, why does not the lease so provide distinctly and directly? Why should it be stated negatively? This is one of the most important provisions of the lease, and why should the obligations to arise out of this provision be left to mere conjecture? It is inconceivable that the parties would have done otherwise than specifically and expressly provide that a new building costing not less than \$150,000 should be erected on the premises during the first decade of the lease if such was the intention of the parties. If such was the intention of the parties, no privilege to remove would have been given, because that is a condition precedent to the possibility of the erection of a new building. Much less would there have been reserved to the lessor the right to thwart such intention by withholding consent to remove or destroy the buildings on the premises. The lease appears to have been drawn by the agent of the original lessor. Had it been present to his thought that the lessees were to be obligated to erect a new building eight stories high, and costing \$150,000, he would have said so directly, and would not have left such an obligation to be gathered by negative inference only. This clause is repugnant to the previous clause; they can not stand together. Effect can not be given to both of them if the contention of the defendant be correct. The only way effect can be given to all the clauses is to so construe the language of the lease that in case lessees decide to tear

down the old building, they shall then erect a new building. This construction would harmonize and give effect to all the provisions of the contract. The only considerations that seem to make against this construction are first, the fact that the paragraphs are separated; next, the provision that the lease provides that upon failure to rebuild, all of the buildings and improvements shall revert to the lessor.

As to the subject-matter being stated in distinct or different paragraphs, the lease is not in script, but is type-written. The paragraphs were probably left to the person who used the type-writer. The natural, grammatical and logical statement of the subject-matter would be effected by using a semi-colon instead of a period after the word "dollars" and allowing the latter provision to follow as a clause of the same paragraph or sentence. I think, however, that the force to be given to the circumstance that there are two paragraphs is at least counter-vailed by the use of the word "but" in the second paragraph. The use of this word necessarily connects the second paragraph, and conditions its provisions by the terms of the first paragraph. They relate to the same subject-matter, and should be construed together.

There is some force in the suggestion that the last sentence of the second paragraph provides that in case of failure to build, all buildings on the premises shall revert to the lessor. It is argued from this that there was an obligation to build, even if the old buildings were not removed. This contention is more ingenious than sound. The lessor, by withholding consent, can prevent the erection of a new building; yet it is claimed that the terms of the lease create an absolute, unconditional obligation on the lessees to erect a new building. The second paragraph undoubtedly, standing alone, would create such an obligation, that is, an obligation to build; but whatever else may be said, it seems to me the provisions of the lease as to the erection of a new building are at least uncertain or doubtful or ambiguous; and courts of equity would therefore be inclined to refuse to give such provision such construction as would avoid the lease, especially in the light of the fact

established by the evidence, that the lessees or their assignee have paid the rent, taxes and expenses as they accrued, and have expended at least ten thousand dollars on improvements upon the property. The right to forfeit a lease for breach of condition must be clear, or it does not exist.

In view of the construction which I place upon the language of the lease, with regard to the question whether failure to erect a new building on the premises constituted a breach of the condition of such lease, it will not be necessary for me to consider many other matters which were argued by counsel, as, for example, whether the Abeyton Realty Company elected to terminate the lease, whether notices of such intention to terminate it were served at the right time, or upon proper persons, or at the right place, or whether the Abeyton Realty Company, in its corporate capacity, elected to forfeit the lease for failure on the part of the lessees to erect a new building.

From what I have said, it would appear that plaintiff would be entitled to the relief prayed for in its petition, unless certain matters set forth in defendants' answer or counter-claim would disentitle plaintiff to such relief.

The amended answer of the Abeyton Realty Company avers that the lease in question contained the following provisions:

"The lessees further covenant and agree not to assign and transfer this lease except with the lessor's consent in writing, unless the rents and all charges, taxes, assessments and penalties, and all liens of any other kind suffered or permitted by said lessees, which the said lessees have hereinbefore covenanted to discharge, have been duly paid, excepting therefrom only such obligations as are not at the time of such assignment due or payable; nor unless the assignee shall expressly assume the lessees' engagements hereunder; nor unless the legal instrument of assignment thereto and assumption of lessees' engagements hereunder and acceptance thereof by such assignees, shall be recorded in the recorder's office of said county.

"This lease is made upon condition that the lessees shall punctually perform all their covenants and agreements herein set forth, and that if at any time the rent, taxes, assessments or other legal charges and payments aforesaid, or any of them, or any part thereof, shall become in arrears and unpaid for a period of three (3) calender months after becoming due, or

1913.]

Realty Co. v. Rockefeller et al.

if any of the covenants and agreements aforesaid shall not be performed as hereinbefore or hereinafter stipulated to be performed by said lessees, the said lessor at any time thereafter shall have full right at his election to enter upon the above described premises and bring suit for and collect all rents, taxes, assessments, payments or other legal charges which may have accrued up to the time of such entry, and thenceforth from the time of such entry this lease shall become void to all intents and purposes whatsoever and this lease and all improvements made upon the premises herein described shall be forfeited to the said lessor without any compensation whatever to said lessees as liquidated damages for such non-performance."

That said lease contained the further provision:

"And the said lessee hereby covenants and agrees to keep all buildings and improvements now on said premises insured for at least twenty-five thousand dollars (\$25,000), and such new buildings and improvements as may hereafter be made and erected upon said premises under the provisions of this lease insured for seventy (70) per cent. of their insurable value; all such insurance to be placed in responsible insurance companies and to contain a clause in the policies therefore providing that the loss, if any, shall be payable to the first party as his interest may appear, and such policies shall be duly delivered to said first party, the lessor, and held by him."

It is also averred that the original lessees from time to time took out policies covering the leased premises, loss payable to defendant, as its interest should appear; that the policies were not in fact assigned by Joseph and Lewis Koblitz to the plaintiff in this case until some time subsequent to September 29th, 1913, when certain riders or attachments to said policies were issued and attached thereto recognizing plaintiff as the insured from and after September 29, 1913. That the said failure to assign the policies to the plaintiff and to have such assignment assented to by the insurance companies, operated to render such policies uncollectible from said companies; and that such failure so to assign such policies and to secure the consent of the companies thereto constituted a violation of the covenant and agreement of said lease in respect to insurance.

It is also averred that when the defendant became aware of such condition, the Abeyton Realty Company gave notice on the 14th day of October, 1913, both to the plaintiff and to Lewis Koblitz and Joseph Koblitz, that the Abeyton Realty Company elected to terminate said lease and to re-enter upon the leased premises, by reason of such failure to keep the premises insured.

The answer and cross-petition of the Abeyton Realty Company further avers that when plaintiff became aware of the fact that the lease had been assigned to the plaintiff, on the 6th day of October, 1913, it gave written notice to the plaintiff of its election to terminate said lease and to re-enter upon the leased premises by reason of such assignment.

A reply was filed by the plaintiff to the answer and cross-petition of the Abeyton Realty Company, putting in issue various matters alleged in such answer and cross-petition. It appears, however, to be well established by the proof that such assignment of the lease was not recorded until September 29, 1913.

It is also clear from the evidence that while Joseph and Lewis Koblitz executed an assignment of the policies of insurance upon the buildings upon the premises covered by the lease, the consent of the insurance companies was not secured to such assignment. The policies, however, were kept alive, the premiums being paid from time to time by the plaintiff; but inasmuch as the consent of the companies to such assignment had not been procured, the lack of such consent would constitute a valid defense in behalf of such companies to any action which might be prosecuted upon such policies. It is therefore clear from the evidence that there was a breach of the conditions of the lease as to the recording of the assignment of such lease. There was also a breach of the conditions of said lease as to the covenant to keep the premises insured; and the question presented is, whether those breaches are such as to disentitle plaintiff in equity to the relief prayed for in this action.

It should be observed that the breach with respect to the assignment does not arise from the fact that the assignment

was made, because under the proof I find that the conditions were such as to warrant the making of an assignment by Lewis Koblitz and Joseph Koblitz to the Koblitz Realty Company; that is, in other words, the assignment of the lease did not constitute a breach of a provision of the lease. The lease does not specifically provide when the record of such assignment shall be made. That being true, it would result that such record should be made within a reasonable time after such assignment. I am of the opinion that the record of the assignment of the lease was not made within a reasonable time after such assignment.

The question to be determined is, whether, under all the circumstances, the fact that such assignment was not recorded until long after the assignment was made disentitles the plaintiff to be relieved from a forfeiture of the lease for such a breach of its conditions.

It was at first insisted by plaintiff's counsel in argument that neither this nor any other breach of a condition subsequent would empower a court of equity to declare a forfeiture of the lease; and in this connection the 82 Missouri Appeals, 618, and the case reported in 10 Ohio, 31, were cited; but later on, in the progress of the trial, counsel for plaintiff waived this point, and indeed counsel on both sides have expressed the desire that this court shall assume jurisdiction of all matters set up in the pleadings, to the end that the whole case may be disposed of at this hearing.

It is contended by defendant that failure to record the assignment of the lease would entitle defendant company to terminate the lease; or, if not, that in any event such breach would disentitle plaintiff in equity to be relieved from forfeiture of the lease.

In view of the fact that both sides have requested this court to exercise jurisdiction in respect to this subject-matter, I think it unimportant whether the pleading filed by defendants be denominated an answer, or cross-petition, or both.

It should be borne in mind that the breach complained of is not that the lease in question was assigned, but that the

assignment was not made of record. This fact would render unimportant, except by analogy, texts and adjudications relative to the subject of assignment with relation to the avoidance of leases. I think the law is the same as applicable to the question of the failure to record and as to failure to insure; and I shall therefore not undertake a separate examination of the law as to each of these propositions.

Numerous authorities have been cited by both sides. In the *24th Encyclopedia of Law and Procedure*, at page 1364, under the head of "relief against forfeiture," the text-writer speaks thus:

"Where compensation can be fully made, equity will generally relieve against a forfeiture. For instance, equity will relieve against a forfeiture for non-payment of rent where, under the circumstances, it would be inequitable, and full compensation can be made for the tenant's default on payment by the tenant of the rent due and costs and damages; but relief will not ordinarily be granted against a forfeiture for the breach of other covenants in a lease, in the absence of equitable circumstances, such as accident, mistake or justifiable reliance on the conduct of the lessor. Relief from a forfeiture for the non-payment of rent is not a matter of right however, and may be refused on collateral equitable grounds, such as delay in seeking relief; and relief will not be granted after the term has expired by the efflux of time even though the lease gives an option of purchase to be exercised during the term, which the lessee has attempted to exercise after forfeiture."

In the *18th American & English Encyclopaedia of Law*, Second Edition, on page 391, under the head of "Fraud, Accident, or Mistake," is found the following language:

"Where the enforcement of the forfeiture would operate as a fraud, courts of equity have granted relief though the forfeiture was incurred for other reasons than the non-payment of rent. Thus, relief has been granted where the lessee's breach was caused by conduct of the lessor which naturally induced him to believe that a performance of the conditions or covenants would not be exacted, or where non-performance was caused by the act of the landlord. And relief has also been granted where the forfeiture was incurred through accident or mistake. Where,

1913.]

Realty Co. v. Rockefeller et al.

however, a forfeiture was incurred because the lessee or his solicitor forgot that the lease contained the covenant for breach of which the forfeiture was incurred, it was held that this was not a mistake so as to authorize a court of equity to grant relief from forfeiture."

In *Pomeroy's Equity Jurisprudence*, Vol. 2, Third Edition, at Section 849, the writer, in discussing the question, under what circumstances relief may be granted where a party is mistaken as to his own existing legal rights, interests or relations, the text-writer uses this language:

"A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, relief has almost always been granted, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned."

And in the same section, the writer uses this language:

"I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

Other texts have been cited, but it is apparent from what I have read, that if the default of the lessee be referable to a mistake of fact, or be not wilful, or if it does not result from gross negligence, courts of equity may relieve from forfeiture because of such default. The exercise of such relief or the granting of such relief may depend upon the circumstances of each particular case. The right to grant relief under such circumstances is undoubted. Whether the facts warrant the granting of such relief must depend upon the circumstances of each particular case.

A large number of cases have been cited by counsel for the defendant, the Abeyton Realty Company, in which the courts of England and the courts of many states of the Union have refused to grant relief. In the earlier history of equitable jurisprudence in England, relief was granted only where there was a failure to pay rent. The courts in all instances, apparently, refused to grant from forfeiture where the breach related to something besides the payment of rent, and that line of cases rests upon the doctrine, apparently, that failure to pay rent may be fully compensated in money, whereas, as to collateral covenants or conditions, the breach will not be fully compensated in money; therefore, in England courts of equity in the earlier history of English jurisprudence, uniformly declined to grant such relief. But even in England the rigor of the ancient rule has been very much softened, and an act of Parliament was passed with a view to softening the rigor of the ancient English rule. The English rule has been very largely followed in the United States, and it was my conviction at first that the overwhelming weight of authority is, that relief can not be granted except as to failure to pay rent.

In the case of *Kann v. King*, 240 U. S., 43, in the course of the opinion rendered in the case by Mr. Justice White, the court uses this language (pp. 54, 55):

“That a court of equity, even in the absence of special circumstances of fraud, accident or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest

1913.]

Realty Co. v. Rockefeller et al.

by a defaulting lessee, is elementary. But that principle can not control this case, even if it be conceded, for the sake of argument, that it applies to collateral covenants in leases, such as the obligation to repair, to insure (and even to pay taxes), said in the Sheets case to be settled in England adversely to such right, but to be an open question in this country, and as to which there may be differences of opinion in state courts of last resort."

The court calls attention to the fact that in England the current of authority has been adverse to the right to relief, but that in this country it may be said to be an open question, although I am frank to say that the apparent weight of authority, at least outside of Ohio, New York, Massachusetts and Vermont, is overwhelmingly against the contention that relief may be granted for breach of collateral conditions.

The question to be determined of course is, what the law of Ohio is on this subject.

An exceedingly interesting case on this point is that of *Eichenlaub v. Neil*, 10 O. C. C., 427. The opinion in the case was written by Summers, J., and the judgment of the circuit court in this case was affirmed without report in 56 O. S., 782. So that this case, properly understood, may rightfully be said to determine the law of Ohio on this subject. The syllabus is as follows:

"Equity will relieve against a forfeiture of a lease incurred by the breach of a covenant to pay taxes, when the breach was not wilful or the result of gross negligence, and no demand for the payment of the taxes was made by the lessor prior to declaring the forfeiture."

This case involved forfeiture of a 99 year lease. It appeared that the lessee had failed to pay the taxes. The contention was made by the lessee in this case that there was no formal demand, and that, therefore, no forfeiture could result, because of lack of such demand. The court discusses that question, and holds that a demand was necessary. But of course that has no important bearing upon the question here. The court, however, discusses the question as to the power of a court of equity to

relieve against forfeiture as to conditions other than those involving the payment of rent. At page 435 of the opinion is found the following:

"The courts of equity could not relieve a tenant from forfeiture for breach of a covenant to insure. Lord Eldon laid it down that the court would not relieve against breaches of covenants except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case the landlord could not by any payment of money be put into the same situation, as he was entitled to be under the covenant. This rule having been found to operate very hardly on those few lessees who inadvertently and not wilfully neglected to insure, the Legislature stepped in and remedied it, but in the case of such inadvertent neglects only." Quoting from *Snell's Principles of Equity*, 314.

The same author says:

"It seems not quite settled whether equity will (and the better opinion is that equity can not) relieve against a forfeiture arising from any breach of covenant other than the breach of covenant to pay rent, unless under very special circumstances. Equity will, however, require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant permits of such performance.

"It was an inflexible doctrine of the ancient common law, that parties must be held to a strict performance of all the stipulations of their valid agreements; that is, unless the agreement was wholly void from its illegality. Whenever, therefore, the full penalty or forfeiture would be enforced by a court of law without the slightest regard to the amount of damages actually sustained by the obligee or promise from the default.

* * *

"The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right, or benefit, equity regards such payment, performance or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor party from such penalty or forfeiture, whenever the actual damage by the creditor party can be adequately compensated. The application

1913.]

Realty Co. v. Rockefeller et al.

of the principle in such cases, and the relief against penalties or forfeitures, must always depend upon the question whether compensation can or can not be made. If the principal contract is merely for the payment of money, there can be no difficulty; the debtor party will always be relieved from the penalty or forfeiture upon paying the amount due and interest. If the principal contract is for the performance of some other act or undertaking, and its non-performance can be pecuniarily compensated, the amount of such damages will be ascertained, and the debtor will be relieved upon their payment." *Pomeroy's Eq. Juris.*, Secs. 381, 433.

Judge Summers also quotes from *Pomeroy's Equity Jurisprudence*, Section 450, as follows:

"It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty; and, on the other hand, the relief is often given, as will appear from subsequent paragraphs, where the agreement secured by the clause of forfeiture is not one expressly and simply for the payment of money."

Sec. 452. "A court of equity will refuse to aid a defaulting party and relieve against a forfeiture if his violation of the contract was the result of gross negligence, or was wilful and persistent."

The court also quotes with approval the case of *Noyes v. Anderson*, 124 N. Y., 175:

"A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no wilful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression."

The court also quotes the following:

"Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused

by accident or mistake, if no actual damage has been sustained by the lessor." *MacTier v. Osborn*, 146 Mass., 399.

Further in the course of the opinion the court quotes from *Story on Equity*, Section 1317:

"A court of equity regards a penalty or forfeiture as intended to secure the fulfillment of the contract and not to enable one party to profit by the default of the other, or obtain a collateral advantage which was no part of the main design."

The court here, as I have said, granted the relief and relieved the party from the forfeiture, which was sought to be effected, on the ground that there was no evidence that the breach was wilful or the result of gross negligence. See the cases cited by Judge Summers in 10 O. C. C. In 124 N. Y., 175, the syllabus is as I have read. In the opinion in the latter case, at page 179, Bradley, Judge, uses this language:

"The power of a court of equity in cases properly requiring it, will be exercised to relieve a party against forfeitures and from penalties. And this is upon the principle of equity jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice or oppression. The doctrine was applied to relieve a mortgagor from the forfeiture to which he was subjected, and an obligor from the penalty with which he was chargeable by the common law on default. It is also not only available to cases of leases where forfeiture of the term and entry are provided for as the consequence of non-payment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them) where the default resulting in forfeiture is in payment of money, as in such case adequate compensation can be made. This relief will not be afforded in cases where the default and forfeiture have been occasioned by the wilful neglect of the party seeking it. Nor will it ordinarily be given where the breach is of a condition precedent, although that rule may not be without exception. In the present case the default was in the performance of a condition subsequent, because the right of the plaintiff under the contract vested on its delivery subject to the provision that it should be avoided or rendered ineffectual by a subsequent breach of the conditions, or any of them, upon

1913.]

Realty Co. v. Rockefeller et al.

the observance of which the defendant's right given by the contract depended."

Quoting from *Giles v. Austin*, 62 N. Y., 486, Justice Bradley says:

"The cases in which relief has been denied, are either where the lessee has wilfully committed some affirmative act in violation of his covenant or been guilty of some default, the precise damage for which can not be ascertained by any rule. But where the covenant is simply for the payment of money, the forfeiture is regarded as security merely for such payment, and equity will not allow it to be enforced after the party has obtained all that it was intended to secure to him."

In the case of *Mactier v. Osborn*, 146 Mass., 399, the syllabus of which has already been quoted, the court, in the opinion, says (p. 401):

"The demandant cites many cases, mostly English, to the point that courts of equity will not grant relief from a forfeiture for breach of a condition to insure. This may be so where there is a wilful and intentional neglect to insure according to the covenant. But where the failure to insure is the result of accident or mistake, each case must be determined by the circumstances of the particular case.

"Judge Story states the rule in England to be, that 'in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise.'"

This would seem to indicate a relaxation of the severity of the ancient English rule, even in that jurisdiction.

The court say, page 402:

"The result of the authorities, supported by sound principle, is, that where there has been a breach of a covenant to pay rent, equity will relieve against a forfeiture although the breach is wilful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty, such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can by compensation or otherwise be placed in the same condition as if the breach had not occurred."

In the case of *Hagar, Admr. v. Buck et al*, 44 Vt., 285, the syllabus is as follows:

"Wherever a forfeiture is taken advantage of that works a hardship, and full compensation can be made, courts of equity generally relieve against it upon the making of such compensation."

And at page 291, the court in its opinion says:

"Wherever a forfeiture is taken advantage of that works a hardship, and full compensation can be made by the person against whom it is wrought, to the one who has taken advantage of it, courts of equity generally relieve against it, upon the making of such compensation."

In the case of *Gilman Henry v. Tupper et al*, 29 Vt., 358, the syllabus reads as follows:

"A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases."

In the course of the opinion, on page 373 the court say:

"But in all cases where the thing to be done was something collateral, * * * before the court could grant relief, they have pretty generally, I think, required to be satisfied that the omission to perform was not wilful but accidental and by surprise, and it has been held always in such cases to depend very much upon the circumstances of the particular case. That relief might be granted in equity, even where the condition was for the performance of collateral acts, seems to be admitted in most of the cases upon this subject." Citing *Webber v. Smith*, 2 Vernon, 103; *Hack v. Leonard*, 9 Mod., 90; *Cox v. Higford*, 2 Vernon, 664; *Saunders v. Pope*, 12 Vesey, 282. "These are cases of non-repair of premises leased; and the chancellor, Lord Erskine, says in the last case, 'I can not agree it is necessary the non-performance of the covenant should have arisen from mere accident or ignorance.' The cases are abundant where the relief has been granted against forfeiture of title by non-performance of other collateral acts, as for not renewing a lease

1913.]

Realty Co. v. Rockefeller et al.

(*Rowstone v. Bently*, 4 Br. C. C., 415), or for cutting down timber when covenanted against, on pain of forfeiture."

In the case of *Giles v. Austin*, 62 N. Y., 486, the syllabus is as follows:

"Where, after issue joined in an action of ejectment brought by a lessor to enforce a forfeiture incurred by the non-payment of taxes and assessments as stipulated in the lease, the lessee pays up the arrears, he may maintain an equitable action to be relieved from the forfeiture. He is not required to seek relief by application in the ejectment suit for leave to file a supplemental answer.

"A covenant in a lease by the tenants to pay taxes and assessments is in the nature of a covenant to pay money and a forfeiture incurred by a breach thereof may be relieved against on the same principles. In the absence of bad faith on the part of the tenant, and where the position of the parties has not been changed, and no new rights have intervened, mere delay on the part of the tenant in making the stipulated payments will not bar him from relief."

It is evident, it seems to me, that there is a manifest disposition on the part of courts of equity to avoid the rigor of the old English rule of forfeiture; and I think the cases to which I have called attention, and such as I have examined to which I have not made reference, establish the doctrine that relief from forfeiture will be granted in the cases following:

1. Where the breach involved was the result of accident or mistake, or grew out of ignorance, inexperience, or inadvertence.
2. Where the lessee has expended considerable sums in improvements upon the premises.
3. Where it would be unconscionable to enforce a forfeiture.
4. Where the breach is technical rather than substantial.
5. Where the breach has not done damage to the lessor.

I think it results from the reasoning of Judge Summers in the case of *Eichenlaub v. Neal*, *supra*, that the older rule, as it obtained originally in England, is not the rule in Ohio, whatever may be said as to other jurisdictions. It is true that the case relates to a covenant to pay taxes, and taxes can be directly measured in money; but the reasoning in that case is as

applicable to the two breaches that are complained of here in the case at bar as it was to the facts presented by that case. And it is interesting to note that the case of *Mactier v. Osborn*, 146 Mass., 399, is quoted with approval, and that case relates to a breach of covenant to insure.

The breach complained of in respect to the failure to record is one which did not operate to the prejudice of the lessor. No interest or right of the lessor was in any manner imperiled by the failure to record; and counsel in argument have not called the court's attention to any circumstances that would make such failure operate to the prejudice of the lessor. But whatever might have resulted, it is plain and conceded that no damage did result from the failure to record; and I am inclined to think that, inasmuch as at the time when it is sought to terminate this lease that breach had been cured, and fully cured, it would be an unwarrantable exercise of the mere power of the court, as distinguished from the right of the court, to say that the lessees should forfeit all rights under the lease because of such mere technical breach of conditions.

The other breach, however, is more serious. It is true that the policies of insurance were kept alive, but they stood in the names of Joseph and Lewis Koblitz. They failed to secure the consent of the insurance companies to the assignment of such policies. By the assignment of the lease, they ceased to have any insurable interest in the property. In case of loss, no recovery could have been had against the companies had they availed themselves of these facts as a defense. The suggestion is made by counsel for plaintiff that the Abeyton Realty Company would have been protected despite the fact that the policies could not be recovered upon by the Koblitz Realty Company. I do not think that this contention is sound. If the facts were such as to defeat a recovery by the insured, or the persons named in the policies as the insured, then there would be nothing to be paid to anybody upon the policies. For three and one-half years there was in fact no insurance which would protect the Abeyton Realty Company. This was a distinct breach of the provisions of the lease. I am inclined to think, however, that failure to

1913.]

Realty Co. v. Rockefeller et al.

take such steps as to make the policies valid after the assignment of the lease was not wilful and intentional, but was due to ignorance or inadvertence; and I am not unmindful of the fact that it has been very strongly urged in argument that the failure to secure the consent of the company to such assignment, and indeed the assignment of the lease itself, were mere juggles, and were due to a desire to reap some unfair advantage, or to avoid some legal obligation. But I am unable to find that such contention is supported by the proof; and I am reinforced in this conviction by the fact that if the leased premises had been destroyed by fire, the lessees would still be liable for the payment of rent. This fact alone would seem to make it impossible to believe that the failure to secure the consent of the companies to the assignment of the policies was wilful or intentional or fraudulent. But from whatever cause such failure proceeded, it is still incontestably true that the defendant company has not been injured by such failure. That they might have been injured, is certainly true; but that they have suffered, surely will not be claimed.

This breach was cured prior to the giving of notice of election to avoid the lease upon this ground. I am unable to conceive of any canon of ethics that would justify the court in holding that these breaches, which were technical rather than substantial, would warrant the court in enforcing a forfeiture of the lease in the face of the fact, undisputed, that the lessees, or their assignee, have paid the rents for ten years as they accrued, have paid all the taxes, assessments and charges, and have expended from ten to twelve thousand dollars upon the property. The aggregate of the rents is \$60,000. The aggregate of improvements is said to be from \$10,000 to \$12,000. To hold that, because of these mere technical breaches, the lessor may now take possession of the property, or that the lessee shall be disentitled to relief in equity, would in my judgment be unwarranted by the facts, and would be an act of injustice.

The decree of the court will be as follows: Decree for plaintiff; order see journal. Defendants give notice of appeal. Bond fixed at five thousand dollars.

OWNERSHIP OF A CERTIFICATE OF STOCK.

Superior Court of Cincinnati.

J. N. RUSSELL, ADMINISTRATOR OF THE ESTATE OF J. N. RUSSELL,
DECEASED, v. THE FOURTH NATIONAL BANK OF CINCINNATI.

Decided, November 5, 1913.

*Corporations—Certificate Outstanding for Stock Shown by Stock Ledger
to Have Been Canceled—Cancellation Ordered by the Court.*

1. A sale of shares of capital stock of a bank is valid and binding although the seller retains the certificate of stock and the shares are transferred on the books of the bank without surrender of the certificate and in violation of the by-laws of the bank.
2. In an action by the administrator of such seller to recover the value of such shares from the bank, the production of the uncanceled certificate of stock raises a presumption of ownership of the shares by the deceased, but this presumption may be rebutted by proof that the deceased, after the issue to him of the certificate, sold the shares to a third person.
3. In such an action, where the court finds that the deceased sold his shares of stock but failed to deliver the certificate therefor to the purchaser or to surrender it to the bank, but that he never thereafter claimed the shares or demanded any dividends upon them, and that the shares were transferred to the buyer on the books of the bank without surrender of the certificate, and that thereafter the dividends were collected by the buyer or those deriving title to such shares from him, the court, in accordance with the prayer of the defendant's cross-petition to that effect, will order such certificate of stock to be delivered up and canceled.

Morse, Tuttle & Ross, for plaintiff.

Charles B. Wilby, contra.

PUGH, J.

The plaintiff, J. N. Russell, administrator of the estate of J. N. Russell, deceased, claims that his intestate, at the time of his death, was the owner of thirty shares of the capital stock of the Fourth National Bank of Cincinnati, and brings this action to have said shares transferred to him on the books of the bank and a new certificate issued to him therefor, or in the alternative for

1913.]

Russell v. Bank.

the value of said shares in money, for an accounting for dividends due thereon, and for interest thereon.

The defendant denies that the plaintiff is administrator as claimed, denies that the deceased was owner of the shares of stock at the time he died, and sets up laches and the statute of limitations, and by way of cross-petition prays a surrender and cancellation of the certificate for said shares held by the plaintiff.

The controlling facts and circumstances in the case are not in dispute, the contention arising over the significance to be attached to them and the legal conclusions which follow.

In 1865, the deceased, J. N. Russell, became the owner of thirty shares of the capital stock of the defendant bank. The dividends were payable semi-annually in May and November, and it is proved that deceased received and receipted for the dividends paid during the years 1865 and 1866. It is equally clear that he never thereafter received any dividends or made any claim therefor.

In 1865, the deceased lived with his family at what was then the village of Linwood, Hamilton county, Ohio, and continued to live there up to the summer of 1889, when he removed with his family to Portland, Oregon, where he remained until his death, June 18th, 1895. As he left no estate, there was at first no administration. During the summer of 1911, the deceased's son, J. N. Russell, in looking over his father's papers discovered a certificate for thirty shares of stock of the defendant bank. It had never been transferred or canceled and, on its face, attested the ownership of the thirty shares by the deceased.

Later, on June 15th, 1912, the son was appointed administrator of his father's estate by the Probate Court of Multnomah County, Oregon, the only assets of the estate being the thirty shares of stock aforesaid. Demand was made on the bank for a new certificate to be issued to the administrator and for an accounting for the dividends on the stock since 1866 but the bank refused to recognize any ownership of the stock in the deceased or his administrator and this action was brought in December, 1912.

The plaintiff produces in court the original certificate and it is admitted that it was never surrendered to the bank and it shows on its face that it never has been canceled. It is further admitted that during the years 1865 and 1866, and ever since there has been in force a by-law of the bank as follows:

“By-law 10. The capital stock of the bank shall be transferable on the books of the bank in person or by attorney only on the surrender of the certificates.”

Substantially, this is all the evidence plaintiff has produced to support his claim.

On the other hand, it appears the stock book of the bank containing transactions prior to 1872 has been lost since 1876 when the bank removed to a new location, but the stock ledger for the years 1865-1867 has been produced, and also the dividend receipt book. The former contains an account with J. N. Russell which shows that, on January 2d, 1865, he acquired thirty shares of the capital stock, and that he disposed of them to W. F. Colburn, January 9th, 1867. The same ledger contains an account with W. F. Colburn which shows that prior to 1867 he was the owner of eighty-two shares of the stock and that, on January 9th, 1867, he acquired thirty additional shares from J. N. Russell.

The testimony shows that, prior to 1902, shareholders called at the bank and received their dividends and receipted for them in the dividend receipt book, but that since 1902 checks for the dividends were sent to shareholders and no receipts were taken. As stated, the dividend receipt book for the years 1865 and 1867 was produced, and it shows the following:

J. N. Russell receipted for semi-annual dividends on thirty shares of stock in May and November, 1865, and in May and December, 1866, and never thereafter receipted for any dividends.

W. F. Colburn receipted for a semi-annual dividend on eighty-two shares in November, 1866, and for semi-annual dividends on one hundred and twelve shares in May and November, 1867, and on ninety-five shares thereafter up to November 17th, 1870, having sold seventeen shares in 1868 as shown by the stock

1913.]

Russell v. Bank.

ledger. On November 17th, 1870, he sold his remaining ninety-five shares which also appears in the stock ledger, and thereafter his name does not appear in the dividend receipt book.

These book accounts show precisely what became of the thirty shares owned by the deceased. It was urged at trial and again in counsel's briefs that this testimony is incompetent and can not in any way affect the plaintiff's claim as they were not made by him nor with his knowledge and consent, and that there is nothing to show that he ever saw or heard of these book accounts. But they are entries made in the regular course of business by the bank in its dealings with its stockholders, and in regard to transactions in which a privity existed between the parties. As such they are competent evidence, though, of course, not conclusive as to existence of matters therein contained.

Furthermore it appears from the testimony that J. N. Russell continued to reside at Linwood for twenty-two years after the time, at which, according to the books of the bank he sold his shares of stock to Colburn, viz., from January 9th, 1867, to the summer of 1889 when he removed to Portland, Oregon. During this time, as the testimony shows, he was in reduced circumstances. From the summer of 1889 to June, 1895, when he died, he lived at Portland, Oregon, a further period of six years, and during this period also, it appears that, while not in a condition of absolute poverty, he was not prosperous and certainly had no money to spare.

If the plaintiff's contention in this case is well founded, during this entire period of twenty-eight years, the deceased was the owner of this stock, whose par value was \$3,000, and its actual value considerably more, and which produced dividends of \$300 per annum, and yet never once did he draw his dividends or claim his stock. He never told anyone that he ever owned any such stock. When he left Linwood for Oregon, he was accompanied by his son, the administrator and plaintiff in this action, who was then a man of twenty-five years of age, and who continued to live with his father till the latter's death, and it is evident from the son's account of their manner of living that dividends of \$300 per annum would have been a very wel-

come addition to the family income, yet at no time, either before or after leaving Linwood did he ever mention the existence of the \$3,000 worth of bank stock which it is now claimed he owned during all that time. The son never knew that his father had owned stock in the Fourth National Bank until he found the certificate among his father's papers, sixteen years after the father's death, and forty-four years after his father had ceased to collect the dividends upon it.

As matter of fact the court finds it proven by the clear and convincing evidence of undisputed circumstances that the deceased, J. N. Russell, was not the owner of the thirty shares of stock in question, but had sold the same many years before to W. F. Colburn, as shown by the books of the bank.

The possession by the administrator of the deceased of the uncanceled certificate for said shares raises a presumption of ownership under the circumstances, but such presumption is not conclusive. It throws upon the defendant the burden of showing by the testimony that, as matter of fact, the presumption is not true. But that is all.

The authorities cited by counsel for plaintiff as to the effect of a failure to comply with a by-law or statute which requires a transfer on the books of a company or a surrender and reissue of a certificate when a shareholder sells his stock, do not apply to a case like this. If Russell, before his death, and after a sale of his thirty shares to Colburn, had retained the certificate and subsequently sold the shares to a third person and transferred the certificate to him and the latter had sued the bank, we would have had the situation represented by the case of *Bank v. Lainer and Handy*, 11 Wallace, 369, cited by plaintiff's counsel.

In *Railway Company v. Robins et al*, 35 Ohio St., 483, the shares were sold and the certificate delivered, but no transfer was made on the books of the company. Subsequently the original owner again sold the shares to a second purchaser and procured the company to issue to said second purchaser a new certificate on the representation that the original one was lost. The court held that the company was liable to the first purchaser as it should not have issued the second certificate without a sur-

1913.]

Walker, Executor, v. Walker et al.

render of the first. All the authorities cited concern the relations between the corporation and a third person purchasing shares from one of its stockholders. No case has been produced, nor has any been found by the court wherein it has been held that when a share-holder to whom a certificate of stock has been issued, himself sues the corporation in any kind of action based on the assumption that he is such share-holder, the corporation is precluded from showing that he has disposed of his stock and no longer has any interest therein, even though he still holds the certificate and has not surrendered the same as required by the rules of the bank on sale and transfer. The distinction between cases like those cited and the case at bar, seems to the court very obvious.

The plaintiff's petition will therefore be dismissed. The court having found that the plaintiff is not the owner of the shares of stock represented by the certificate in his possession, and it being obvious that, if said certificate is transferred to a third person, who is ignorant of the circumstances, it may impose a liability on the bank which it should not be required to assume, the prayer of the defendant's cross-petition will be granted and the certificate ordered surrendered and canceled.

DOWER AWARDED TO A COMMON LAW WIFE.

Common Pleas Court of Delaware County.

CORNELIUS WALKER, EXECUTOR, ET AL, V. EDNA WALKER ET AL.

Decided, 1913.

*Husband and Wife—Common-Law Marriage Sufficiently Established,
When—Dower Interest of Wife in Husband's Estate.*

Misgiving on the part of a common-law wife and some of her neighbors as to the legality of her marriage is without significance, where it appears that she and her reputed husband entered into a solemn contract, in the presence of a witness, to henceforth live together as man and wife, and this agreement was carried out, and a child was born to them, and they continued to live together, with short interruptions and to hold themselves out as man and wife

Walker, Executor, v. Walker et al. [Vol. 15 (N.S.)]

until the death of the husband; and in such a case the court will decree that the woman has a dower interest in the estate of the decedent.

Overturf, Hough & Jones, for plaintiffs.

Marriott, Freshwater & Wickham and *Fitzgibbon & Montgomery*, contra.

FULTON, J.

This action is submitted to the court upon the question as to whether or not Amanda Whitney Walker, or Amanda Whitney, is entitled to dower in the real and personal property of Abraham Walker, deceased.

The defendant, Amanda Whitney Walker, or Amanda Whitney, claims dower in this property as the wife of Abraham Walker. It is admitted that there was no statutory marriage between Abraham Walker and Amanda Whitney, but it is claimed that there was a common-law marriage existing between them at the time of the death of Abraham Walker and that, by reason of that common-law marriage, she is entitled to dower in his property.

That common-law marriages are recognized in this state is beyond contradiction, for several times common-law marriages have been recognized by the courts of this state.

The latest case in which the subject is discussed, and where the Supreme Court states what it takes to constitute a common-law marriage, is in 85 Ohio State, at page 238, in the case of *Umbenhower v. Labus*. The syllabus in that case reads as follows:

“An agreement of marriage *in praesenti* when made by parties competent to contract, accompanied and followed by co-habitation as husband and wife, they being so treated and reputed in the community and in circle in which they move, establishes a valid marriage at common-law, and a child of such marriage is legitimate and may inherit from the father.”

The evidence shows that on Decoration day, at Johnstown, Ohio, in the cemetery, Abe Walker and Amanda Whitney, in the presence of Lee Skinner, made a contract by which they agreed

1913.]

Walker, Executor, v. Walker et al.

to live together thereafter as man and wife; that, during that talk, it was discussed between them as to whether or not they could do that lawfully and that Abraham Walker informed Mrs. Whitney that he had been informed by an attorney that such a marriage was legal; that Abraham Walker gave to her as a reason for not wanting to be married with a ceremony under the statute that business relations between himself and his brother would prevent it, that he would be compelled to divide his property with his brother, and that he would lose money in that way if a marriage was made in the usual way by license and the performance of the ceremony by an authorized person.

The testimony tends to show that, from that time on, Amanda Whitney went to live with Abraham Walker, and that she lived with him as his wife; that they bedded together; that she cooked for him, and that she washed for him and that she had a child by him. And while the testimony discloses that there might have always been some doubt in the mind of Amanda Whitney as to the legality of the marriage which she had entered into with Abraham Walker, yet she carried out the contract of marriage and the agreement with him, and she performed all the duties of a wife toward him; she had a child by him, and Walker himself on many occasions stated that she was his wife the same as any other married couple in that community. When he spoke of his will, he told Albert Dresback that he had left, in a manner, everything to his child. Dresback then asked what he had done for the mother of the child—what arrangements he had made for her. His reply was: "She will come in just the same as my wife, and that is what I wanted to tell you; that she will come in as a common-law wife; that he had left his brother as executor without bond to look after everything, to go ahead just as they had been doing."

This conversation with Dresback was just before Abraham Walker started to the hospital to have an operation performed, and from which operation he died.

Abraham Walker always stated, whenever the subject came up, that Amanda Whitney was his wife the same as if legally married, and never at any time did he claim anything, when talking of this matter, except that she was his wife, and legally his wife.

That Amanda Whitney had some doubts about this marriage, there can be no question, because her acts can not be explained in any way except that she doubted the legality of their relations and of this marriage.

We all know and recognize the fact to be that common-law marriages are rare and there was doubt, not only in the mind of Amanda Whitney, but in the minds of some of the people of the community whether this was a legal marriage, because they only knew of the statutory marriage. However that may be—whatever may have been in the minds of her neighbors, who knew the facts and circumstances would not control or change the fact as to this marriage, if the marriage was a common-law marriage, and all the actions and statements of Abraham Walker were to the effect that she was his wife; that the child born was his own daughter, and in his will he treats her as his daughter and gives her the bulk of his estate; and it seems to the court, under all these circumstances, it would be an outrage and a great wrong to hold otherwise than that Amanda Whitney was the common-law wife of Abraham Walker.

The court finds, from the testimony, that they did make a solemn contract, in the cemetery, to live together as man and wife, and that they immediately carried out that contract by going to live together; that they continued, with a few interruptions, to live continuously together as man and wife up until the death of Abraham Walker; and Amanda Whitney, as such wife, is entitled to dower both in his real and personal property, and such is the holding of this court. Exceptions may be noted; bond for appeal in the sum of \$——.

1913.]

Janas et al v. Graves.

INVALID PROVISIONS OF THE MOTOR VEHICLE LAW.

Common Pleas Court of Franklin County.

CHARLES C. JANAS AND THE OHIO STATE AUTOMOBILE COMPANY V. CHARLES H. GRAVES; SECRETARY OF STATE.

Decided, December, 1913.

Constitutional Law—Regulations for the Use of Highways by Motor Vehicles—Fees for Police Surveillance—Excise Tax for Use of Roads.

1. Sections 6294 and 3609 (6309) being part of an act to regulate the use of motor vehicles as a police measure are invalid for the reason that the amount of license fee exacted constitutes an attempt to impose a tax for revenue for general state purposes.
2. Article II, Section 16, and Article XII, Section 5, of the Constitution, are vital and essential in their provisions as applied to a single legislative enactment which seeks to exercise both the power of police regulation as well as that of taxation for revenue, and when essential to mark off the boundaries of legislative power, should be regarded as mandatory, at least that applying to taxation measures.
3. The regulation of motor vehicles by the act in question converts what would otherwise be a common right into a privilege upon which the Legislature may impose an excise tax for the use of the highways by motor vehicles. Such tax is subject to the limitation that the amount thereof shall be the reasonable value of such use, privilege and enjoyment. A reasonable tax may, therefore, be imposed upon the use of highways by motor vehicles for the repair and maintenance of such highways. The imposition of a tax such as will create a large surplus beyond what is considered to be the reasonable value of the use, privilege and enjoyment of the highways and what should be reasonably contributed by the owners of such vehicles for the repair and maintenance of the highways, so as to raise a fund for the state general revenue and to make up deficiencies arising therein, violates the constitutional provision respecting the quality of protection and benefit to the people.

C. D. Saviers (Columbus), H. L. Gordon (Cincinnati) and R. H. Lee (Cleveland), for plaintiffs.

Timothy S. Hogan, Attorney-General, and James M. Bougler, Special Counsel, for the State.

KINKEAD, J.

This case involves the validity of the amendment made to the motor vehicle law, passed at the last session of the Legislature. It is now submitted on final hearing involving the merits of the whole case. The claim that the law is valid because the tax imposed is an excise tax has been so strongly urged that the court has given the power to impose police regulation and to exact a tax careful consideration. The substantial changes made in the law by the last amendment consisted in the increase of the fees to be paid by owners of motor vehicles for the privilege of operating them. The fees are graduated according to horsepower; the claims of the parties were sufficiently set out in the original opinion (15 N. P. [N. S.], 17). The additional fact developed by the evidence on final hearing, which is vital to the question, is that the defendant drew the amended bill, that he made an estimate of the probable revenue that would be realized from the increased fees for the year 1914, and furnished the same to the Governor. It is clearly established that the whole purpose of the amendment was to raise revenue. That a tax is imposed is conceded by the defendant, the claim of justification therefor being that it is an excise tax levied under constitutional right. It is important to note that by the application of well settled rules of statutory construction the court may look to the circumstances existing at the time of the amendment; it may also consider general facts of common knowledge and other legislation on the subject of revenue (36 Cyc., 1136). It is to be noted that the changes in legislation concerning the liquor traffic created a material decrease of state revenue. Resort was therefore made to the existing motor vehicle law to raise additional revenue to make up that deficiency. The fees for registration were increased according to horsepower, and two-thirds of the surplus derivable from such tax was made a part of the general revenue of the state. One-third of such surplus, instead of all as before, was to be expended on the roads.

In support of the right to impose an excise tax, reliance is placed upon the amendment to Article XII of the Constitu-

1913.]

Janes et al v. Graves.

tion and Section 10 thereof, which provides that: "Laws may be passed providing for excise and franchise taxes, and for the imposition of taxes upon the production of coal, oil, gas and other minerals." It is doubtful whether this added anything to the existing power of the Legislature to assess an excise tax. It certainly did not so far as this case is concerned. But whether it does or not is immaterial because the right to exact an excise tax in a proper case clearly exists. The necessity of resort to this species of taxation did not arise until the material growth of the state made it necessary to seek other fields for raising revenue. The problems of dealing with the evils resulting from the liquor traffic, the legislation and adjudications dealing therewith presented an anomalous situation in the field of license and taxation. The power of taxation is searching in extent, reaching every trade, occupation, business, industry, as well as privilege, use or enjoyment, constantly and intimately touching all relations of life. Its only limitation is *necessity* which in the field of taxation "knows no law," save the absolute need of raising revenue from legitimate sources within constitutional limitations. But when the Legislature embarks upon a legitimate scheme of taxation, it must do so in a proper manner. It can not do it *indirectly* or *incidentally* to some other legitimate object and purpose, as when in the exercise of police power. Legal distinctions names and divisions are not only essential for the sake of philosophy, logic and reason, but for the protection of rights and to keep the Legislature within its powers as well. It is not consistent with reason, logic or justice for the Legislature to enter the field of police regulation and to impose a tax by the single exaction for both purposes, because the fund realized may be unjustly applied as is the case in the law in question. Taxation is one vital purpose and object of government, while police regulation is another. The proper exercise of either power may not be readily and truly judged when both are improperly pursued in one law, which makes it impracticable if not altogether impossible to apportion and apply the fund within constitutional limitations. For in such effort, as in the law in

question, it is difficult to determine with logical precision where the exercise of one power ends, and the other begins. The Legislature possesses both the power to impose police regulation and to exact an excise tax. But it will be difficult to mark off the lines of power, perceiving the end of one and the beginning of the other, with such degree of exactness as to guard individual right and properly judge the propriety of the exercise of each. So therefore, the Constitution wisely demands that but one purpose should be pursued at a time by a legislative act, especially so in one imposing a license fee for police purposes, or one exacting a tax for revenue. Certain rules have been formulated by means of which the propriety of the exercise of either may be determined. The constitutional requirements that an enactment of the Legislature should contain but a single subject instead of two, and that every tax law should state the object of the same to which only it shall apply (Art. II, Section 16, Art. XII, Section 5) were not mere idle ceremonial requirement. These constitutional exactions had distinct and practical purposes in view; they are vital and essential in a case like the one under consideration. Though the first may be, as is held, merely directory, and though non-compliance therewith be not fatal to a law in some instances, still the requirement stands as a monument to logical distinction and accurate analysis, and when essential to mark off the boundaries of legislative power, should be regarded as mandatory. Earlier opinions to the effect that the uniformity clause of the Constitution applies only to property tax (*Ashley v. Ryan*, 49 O. S., 524; *Adler v. Whitbeck*, 44 O. S., 565) are entirely sound because the nature of an excise tax is to single out a class, but there has been no occasion so far as the reports disclose for the consideration of the requirement that a tax law shall state its object and the application of the fund to a case such as is presented here. There has not been sufficient resort to the field of excise taxation to afford opportunity for a consideration of this question.

I am of the opinion that Section 5 of Article XII furnishes the governing principles for all laws levying taxes for general

1913.]

Janes et al v. Graves.

revenue purposes. That is the reasonable and true conception of the constitutional limitation upon the right to impose any kind of tax either upon property or in the form of an excise for the purpose of producing general revenue. Discriminating care must be used in citing and following judicial precedent. If we fail in this duty, or if we follow it without care and discrimination, violence may be done the cause of justice. I do not believe the expressions found in opinions rendered many years ago in dealing with the old question of imposing a license tax on the liquor traffic should have weight on the applicability of this provision of the Constitution to an excise tax. It is essential to keep separate the power of police regulation and the power to tax for revenue purposes. Combined exercise of both in the production of a surplus fund beyond the reasonable cost of police regulation, and transcending as well the reasonable value of protection and benefit derived from a privilege conferred by the state is beyond the power of the Legislature. The limits of the power to prescribe police regulation for the general welfare or public safety are definitely defined, beyond which the Legislature may not go without transcending the right to legislate on that subject. It can not pass beyond the scope of police power, and enter the field of taxation for revenue purposes without transgressing the power of police regulation. The two objects—that of police regulation, and that of taxation for revenue—can not be pursued in one legislative act with safety and due regard to private right, because the Legislature loses its power to impose police regulations the moment it passes beyond the point of regulation and undertakes to raise revenue for general purposes of governmental administration and makes it possible to abuse legislative power. This doctrine so well expounded by the learned Ranney in *Mays v. Cincinnati*, 1 O. S., 268, and followed so universally everywhere ever since, marks the boundary of the exercise of police power, limiting it to the reasonable cost incurred in the supervision of the regulatory processes of the power. That a fund so exacted and created should incidentally increase the revenue would be immaterial. But

such a principle can not be applied to a case like this, where the surplus beyond the point of regulation is expressly created for purposes of revenue.

An excise tax is an imposition laid upon a proper subject for the express purpose of raising revenue for general purposes. And the settled rule of limitation in its exercise is that the value and amount fixed by legislative power must not exceed the reasonable value of the franchise or privilege (*Southern Gum Co. v. Laylin*, 66 O. S., 578). To add to a police regulation a tax for revenue, makes it impossible to properly adjust and distribute the proportionate part of the fund realized to the cost and expense of the regulation and the portion which should be applied to the general expenses of government. This makes it difficult, if not altogether impossible, for the Legislature to keep within the province of its respective powers. This consideration is a complete demonstration of the wisdom of holding the requirement of the Constitution that tax laws shall distinctly state the object thereof and how the fund shall be applied, to be mandatory, especially in such a case as the one at bar. We hold that it is. The application of the fund derived from a license fee or tax may only be applied in the cost of the necessary police regulation, while the fund derived from taxation may be extended for general purposes. The result of such disposition of funds finds practical illustration in this case. The actual cost of imposing the police regulation does not exceed from \$60,000 to \$100,000, while the surplus beyond such cost ranges from \$300,000 to a million dollars. This is proof that a police regulation is converted into a tax measure. That this can not be done is so axiomatic that it is useless to extensively cite authority. One may turn to Longsdorf's Notes and find how frequently *Mays v. Cincinnati* has been followed and approved. Special attention is called to the latest leading case in the state on the subject of license, *Marmet v. State*, 45 O. S., 63. This was cited and followed in the later case of *Great Atlantic, etc., Co. v. Village*, 85 O. S., 120.

That the law in question is primarily a police measure, that its express and paramount object and purpose in police regula-

1913.]

Janes et al v. Graves. v

tion in the interest of the public welfare and safety, is so apparent as to be beyond the possibility of successful contradiction. Several reasons may be offered in support of this statement. The strongest and most conclusive is that the Supreme Court in *Allen v. Smith* 84 O. S., 283, has held it to be a police measure.

The language of Justice Spear is particularly forceful touching the character of the law as a police measure:

"The act in question partakes of a twofold nature. Some of its provisions come purely within the domain of the police power; other within the general legislative power, while others partake of both characteristics. It is a remedial act, intended, in the first instance, to regulate the use of automobiles, and to provide for the safety of others who are lawfully using the public highways. Why should they not be regulated, and why should not the old fashioned user of the highway be protected by the law? Doesn't everybody know that the automobile is a new machine of travel; its use a new use of the highway; that it is dangerous to other travelers; that its power, its capacity for speed, the temptation it affords the reckless driver to operate it at a reckless rate and in a careless manner, all distinguish the automobile from all other vehicles. Surely it can not be necessary to further elaborate this fact so patent to every observing and reading person. The automobile is, therefore, a class by itself, the users of such machines a class by themselves and legislation in recognition of this condition is based upon a solid, easy recognized distinction."

It seems unnecessary to further elaborate upon the clear character of the law as a police measure. Still it is so essential that this paramount feature of the law shall be the index of its validity that some further matters may be mentioned. The title of an act is "A key to open the minds of the makers of the act, and the mischiefs which they intended to redress" (*Income Tax. Comrs. v. Pemsel* (1891), A. C., 531; 36 Cyc., 1132). "The purpose of our statute appears from its title * * * and although it is said that the title forms no part of the act (1 *Ld. Raym.*, 77) yet the reason of this dictum appears to be the practice of Parliament by which the title is prefixed to the statute at the discretion of the clerk, * * *

but such is not the practice with us. The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the Legislature. We may, therefore, consider it as explanatory of the object of the law" (*Burgett v. Burgett*, 1 Ohio, 469). The right and duty of the court to consult the title in determining the meaning of a statute is clearly settled (*State v. Pugh*, 43 O. S., 113; *State v. Bolden*, 107 La., 119; 90 Am. St., 280; *Rushville v. Gas Co.*, 132 Ind., 582; 15 L. R. A., 321). The title may be a guide to the intention of the law makers. *White v. Lincoln*, 5 Neb., 515; *Garrigus v. Park Co.*, 38 Ind., 71; 36 Cyc., 1133.

The original act was passed April 2d, 1906 (96 O. L., 320), and was entitled, "An act to compel owners and operators of motor vehicles to register with the Secretary of State." The fee was \$5 for each machine, the power of which did not exceed 30; in excess of 30 in addition to the \$5 fee, \$3 for each and every ten horse power over 30 was imposed. The fees were to be expended for the actual construction of improved roads. It was again amended May 9th, 1908, and entitled; "An act to provide for the registration, identification and regulation of motor vehicles" (99 O. L., 538). It is an indicative fact that in this amendment the graduated fees were omitted and the fee for gasoline motor was fixed at \$5, and \$3 for an electric. And the *revenues* derived from the *registration fees* were to be "maintained as a separate fund for the improvement, maintenance and repair of the public roads." There was an amendment March 12, 1909 (100 O. L., 73), and the last one now under consideration was April 28, 1913 (103 O. L., 763). The only material change made by the present law was the increase of fees and the disposition of the fund by silently leaving two-thirds of the surplus in the general revenue fund without other application of the same.

The conclusion must be that the primary and paramount purpose and object of the law is that of police regulation, and as such, its validity must be determined. The purpose of the amendment to raise revenue is to be regarded as incidental to that of police regulation. The rule to be applied, therefore, is

that because the exaction for the purpose of regulation is so far in excess of the necessary expenses of registration and of the police regulation provided by law which the state must bear, that it must be considered the incidental imposition of a tax for revenue (*Mays v. Cincinnati*, 1 O. S., 268). This case has been followed in *State v. Kleetzen*, 8 N. D., 290; *Bruner v. Mun. Corp.*, 8 N. P., 307; *Pleuler v. State*, 11 Neb., 561; *St. Paul v. Treager*, 25 Minn., 252; 33 Am. Rep., 462; *State v. Boyd*, 63 Neb., 831; 58 L. R. A., 108; *St. Louis v. Insurance Co.*, 47 Mo., 153; *Adams Exp. Co. v. Owensboro*, 85 Ky., 268; *State v. Irey*, 42 Neb., 189.

Authorities are numerous that a license fee must be invalid when so excessive as to be an obvious exercise of the power of taxation. Whenever it is manifest that the amount of such tax imposed in the exercise of police power is substantially in excess of the reasonable expense of issuing a license and regulating the occupation to which it pertains * * *, the act or ordinance imposing the tax is invalid. *Ft. Smith v. Ayers*, 43 Ark., 82; *Duckwell v. New Albany*, 25 Ind., 283; *Ottumwa v. Zekind*, 95 Ia., 622; 58 Am. St., 447; *State v. Rowe*, 72 Md., 548; *State v. Finch*, 78 Minn., 118; 46 L. R. A., 437; *Jackson v. Newman*, 59 Miss., 375; 42 Am. Rep., 367; *Springfield v. Jacobs*, 101 Mo. App., 339; *State v. Angelo*, 71 N. H., 224; *State v. Moore*, 113 N. C., 697; *Muhlenbrink v. Commrs.*, 42 N. J. L., 364; 36 Am. Dec., 518; *People v. Jarno*, 19 N. Y. App. Div., 466.

The regulation concerning the sufficiency of brakes and alarm devices, lights, speed, duty when meeting horse drawn vehicles to stop as well as when an accident occurs, prescribing penalties for failure to conform to the requirements as to registration and the other regulations, are the objects of police power. The service rendered by the arm of state government provided by this law has to do with the registration alone. A very much smaller fee than is now imposed will be adequate to cover these expenses. If there is anything to be imposed for the regulation beyond this, it must have to do with the police regulation which falls within the jurisdiction of the local police officers. And there is nothing of this kind to be found in the law.

The line of demarcation between the limits of police regulation and the purpose of the imposition of an excise tax, finds apt illustration in the suggestion just made. In assessing a license fee, or license tax as it is sometimes called, it may be large enough to recompense the government for the additional burden, trouble and expense in regulating the dangerous agency for the public welfare. On the other hand, an excise tax has for its primary and sole purpose the raising of general revenue. And its limitation is marked by the value of the franchise or privilege granted by the government. If the license tax goes beyond the reasonable expense of regulation so as to disclose a manifest purpose to raise revenue, the law is invalid. If the excise tax goes beyond the reasonable value of the privilege, use and enjoyment granted by the state so as to infringe upon the principle of equal protection and benefit, the same is invalid.

For the reasons stated it is clear and beyond doubt that that part of the law which undertakes to raise revenue and to make disposition thereof, renders the law invalid and unconstitutional as an exercise of police power.

We now give special attention to the claim made on behalf of defendant of the right to impose an excise tax upon the privilege of using the highways for motor vehicles. It seems essential to express our views upon this question for the purpose of demonstrating, if we can, how the right to exercise the power of imposing an excise tax can not be made in the manner in which the Legislature has clearly undertaken to do. We have been more than pleased with the discriminating care and attention given the task by counsel for defendant in this case. His insistence has driven the court to consider closely the question sufficiently to perceive and conclude that an excise tax may be levied in a case like this in addition to the imposition of a regulation fee. We feel like remarking, however, that counsel have not explored the bed rock of logic and reason of the intrinsic facts of the case, aside from precedent, to sufficiently demonstrate the propriety of the exercise of the right to impose an excise tax in the manner in which it has been attempted. We believe that the conclusion which we have arrived at con-

cerning the exercise of this right, and the reasons stated therefor, is an advance step in the field of judicial opinion, although there have been two or three judicial interpretations along this line without statement of the principles upon which it is founded. *Mark v. District of Columbia*, 37 App. D. C., 563; 37 L. R. A., 440; *Bozeman v. State*, 61 So., 604 (Ala., 1913). See also *Clearly v. Johnston*, 74 Atl., 538 (N. J., 1909); *Kane v. Titus*, 80 Atl., 453 (1911, N. J.); *City v. Kersey*, 64 N. E., 469; 159 Ind., 300; *Ruggles v. State*, 87 Atl., 1080.

For years past we have not been in the habit of dealing with an excise tax except when levied upon a particular business or occupation, or upon franchises granted by the state. We have never had occasion to consider the applicability of the principles of excise taxation to a privilege which is the outgrowth of an essential police regulation, such as is present in this case. The power to impose taxes is unlimited except by certain constitutional guaranties that tend against oppression and unreasonableness. It is searching in extent. It reaches every trade or occupation; every object of industry as well as *use* or *enjoyment*. It constantly and intimately touches all relations of life through the exactions made under it. It rests upon necessity and is inherent in every sovereignty, although it is included in the general grant of legislative power (Cooley Const. Lim., 6th Ed., 587). The power to tax is the one great power upon which the whole governmental fabric is based. Its exercise is not to be measured by microscopical or mathematical precision, nor are theoretical notions to be lightly advanced to invalidate a tax. Taxation is practical, and is to be regarded in its actual, practical results (*Ingwerson v. U. S.*, 107 U. S., 509, 514). As the power rests upon necessity, the Legislature is to be governed by the principle. The necessities of one period and its conditions may not be the criterion for another time and different conditions and necessities. We realize that to permit governments to grow and prosper and to properly meet new conditions, the fundamental law must receive a construction and be interpreted in the light of new conditions and necessities. In this spirit we approach the right claimed in

this case of the Legislature to impose a tax upon the use and privilege of enjoyment of the public highways of the state by owners of motor vehicles. We think the Legislature has the right to impose an excise tax upon the *use* and *enjoyment* of the highways by owners of motor vehicles, and the *privilege* of running and operating the same thereover. This right of the Legislature may be based upon necessity arising from this new and more dangerous and destructive use of the highways and need of more constant repair and improvement so that these enjoying this privilege may do so to the fullest extent. It may be based on the practical fact and result that because such use is peculiarly burdensome on the purse of the local township, county and state which should be proportionately relieved by contribution from owners of motor vehicles of their proportionate share and for their benefit, protection and enjoyment. It may be based upon the fact that this new use is also a burden on the adjacent land owner—the farmer—who pays a tax on a different basis, making it equitable for the owner of the motor vehicle to contribute his equitable proportion as to that class of tax-payers. It may be based upon a necessity created by the new use of the highways by the owners of motor vehicles themselves, full and complete enjoyment of which use and privilege makes good roads essential and of more importance than ever. Good roads can not be had without money. And it is one of the plainest principles which should be forged in the common shop of justice and made part of the taxing power, that every one using and enjoying a thing of public necessity should contribute his equitable proportion of the cost of maintaining such necessity which is to his peculiar advantage, protection and benefit. The judicial vision is not to be obstructed by precedent which seems to prevent a step forward whenever this is essential for the general welfare. In one instance, for example, a vehicle tax had been imposed on the use of vehicles, the purpose of which was to raise a fund to improve the streets. This was held to be illegal because it was taxation of a common right. Later a constitutional amendment was made authorizing the imposition of a wheel tax. This was held to be applicable

1913.]

Janes et al v. Graves.

to the automobile, though it was not a use made of the streets when the tax was imposed. It was considered that after the amendment to the Constitution what was before a common use, was converted into a privilege, which was subject to a tax. See *Chicago v. Collins*, 175 Ill., 445; 67 Am. St., 224; *Berry, Auto. Section 87*; *Harders F. P. Co. v. City*, 235 Ill., 508; *Ayers v. City*, 239 Ill., 237.

We should give the provision of the recent amendment to the Constitution such interpretation as will embrace the *use*, and *privilege of enjoyment* of the highways by owners of motor vehicles within its contemplation, and authorize an imposition of an excise tax thereunder for such privilege, use and enjoyment. The admitted necessity for police regulation is conclusive evidence and argument that what would otherwise have been a common right, is now to be regarded under such regulation as a privilege governed by the limitations therein prescribed. Owners of motor vehicles only have the right and privilege to use the highways when they have complied with this law. The state having granted them the right and privilege of using the highways, it may therefore exact for such use and privilege a fair and reasonable recompense in the form of an excise tax, such as will reasonably cover the fair value thereof.

We are fully aware that it is a grave and delicate duty devolved upon the judicial branch of government to invalidate a revenue measure; such an act should not be lightly or unadvisedly set aside. If it is plainly antagonistic to the Constitution, it is the duty of the court to so declare (*Ingwerson v. U. S.*, 107 U. S., 509, 514). "The power of taxation can not extend beyond what is for common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the General Assembly, but finally with the courts" (*Southern Gum Co. v. Laylin*, 66 O. S., 578, 595). So in a case like this an excise tax imposed upon a use or enjoyment of a privilege of the highways by owners of motor vehicles should not transcend or go beyond the reasonable value thereof. To tax such right or privilege for purposes clearly beyond and foreign to its exercise, such

as is attempted to be done by the law in question, is prohibited by the Constitution because in denial of equality of protection and benefit. Such right or privilege may fairly and reasonably be required to contribute to its enjoyment to the extent of the use which involves the repair and maintenance of the public highways. To go beyond the equal protection and benefit of owners of motor vehicles in the use of the highways or in the protection given them by any law by the imposition of an excise tax for the purpose of adding to the revenue for general expenses of government is foreign to the purpose of an excise tax in such case. That it is in denial of the equal protection and benefit principle contained in the Constitution is ably and conclusively established in *Southern Gum Co. v. Laylin, supra*, viz.:

“But upon the power to tax privileges and franchises there is no express limitations in the Constitution, but certain limitations upon that power must be implied from other provisions of the Constitution so as to make the whole instrument harmonious and consistent throughout. The Constitution was established to ‘promote our common welfare’ (preamble of the Constitution). Government is instituted for the equal protection and benefit of the people (Section 2 of the Bill of Rights). Private property shall ever be held inviolate but subservient to the public welfare (Section nineteen of the Bill of Rights). These provisions of the Constitution are implied limitations upon the power of taxation of privileges and franchises, and limit taxation of the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. * * * These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation can not be extended beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the General Assembly, but finally in the courts.”

By the application of the foregoing constitutional principles to the attempt made in this case, as part of a license fee regulation, to impose an excise tax, transcends the legislative power. The imposition of a tax to such an extent that a large surplus will be accumulated, one-third of which may be considered to

1913.]

Janes et al v. Graves.

be the reasonable value of the privilege, and two-thirds of which is to be applied to another and different purpose, having no special relation to the benefit, violates the constitutional provision respecting equality of protection and benefit to the people.

We are finally of the opinion and find accordingly that Sections 6294 and 3609, which was intended to be 6309, are invalid and unconstitutional on the grounds and for the reasons stated in the opinion.

Section 6301 is a proper exercise of the right of excise taxation and is a valid provision. It includes a tax on a manufacturer or dealer in motor vehicles and upon the occupation of a chauffeur.

Under the views herein expressed it is within the power of the Legislature by a separate and proper act, and in obedience to the constitutional requirement applying to the passage of a taxation act, to impose an excise tax upon the use, privilege and enjoyment of the highways by owners of motor vehicles, in addition to the police regulation fee, and subject to the limitation that the amount of the tax shall be the reasonable value of the use, privilege and enjoyment.

An order of permanent injunction may be drawn against the defendant enjoining him from collecting the amount of money as provided in Section 6294 and of making disposition thereof under 3609, or as intended, 6309.

**CONTRACT FOR SALE OF PROPERTY ALLEGED TO BE HELD
UNDER A DEFECTIVE TITLE.**

Superior Court of Cincinnati.

MARY E. SCOTT V. MABEL E. WALKER.

Decided, December 3, 1913.

Specific Performance—Will Not be Enforced Where Title Has Been Acquired by Adverse Possession—Presumption as to Cancellation of Mortgages Covering Property Sold in Judicial Proceedings—Title Taken by a Trustee Not Necessarily Reduced to a Life Estate by Failure to Include Words of Perpetuity in the Granting and Habendum Clauses.

1. Where the records of a foreclosure suit have been destroyed by fire, riot, or civil commotion, and only the deed of the master commissioner remains, the court will assume that the mortgages involved were ordered canceled or released of record.
2. Where the deed of such master commissioner purports to convey all the right, title and interest not only of the mortgagor, but also of all parties to the suit including the mortgagees, no claim or interest remains outstanding in such mortgagees even though their mortgages have not been canceled or released of record
3. Where a master commissioner conveys property to the trustee of a building association, "his successors and assigns forever," equity will decree that the trustee shall take an estate in fee simple if it is necessary for him to take such quantum of estate in order to fully perform the duties of his trust.
4. Where the interest of the person whose property is sold at foreclosure sale, is an estate in fee simple, a conveyance by a master commissioner of all the title and interest of such owner and mortgagor would pass an estate in fee simple, even though words of inheritance were not used in the deed.
5. A court of equity will not decree specific performance of a contract for the purchase of real estate where the only title that the vendor can convey has been acquired through his adverse possession under a statute of limitations.

Hicks & Hicks, for plaintiff.

Eltzroth & Maple, contra.

1913.]

Scott v. Walker.

SUTPHIN, J.

This is a suit for specific performance of a contract for the purchase of real property. On June 27, 1913, plaintiff and defendant entered into a written contract by the terms of which plaintiff agreed to sell to the defendant certain real property located in Madisonville, city of Cincinnati, and the defendant agreed to pay therefor the sum of \$5,025 upon the delivery of a deed when the title was found to be good. At the time the agreement was entered into the defendant paid to the plaintiff the sum of one hundred dollars, with the understanding that if the title was found to be good it was to be credited on the purchase price, but if the title was not found to be good it was to be refunded. Defendant claimed that the title to the property was defective and unmarketable and not good, and notified the plaintiff to that effect a little over a month after the contract had been entered into, and on September 12th plaintiff filed her petition for a specific performance of the contract. The answer of defendant, after admitting the contract, set up various particulars in which the title was not good, and by a cross-petition sought to recover the original deposit of one hundred dollars. In reply to the answer and in answer to the cross-petition, the plaintiff pleaded the details of title to her property in support of her contention that she was prepared to give a good and merchantable title to her property.

The cause came on for hearing upon a motion of plaintiff for judgment on the pleadings and upon a demurrer of defendant to plaintiff's reply. As counsel agree that the pleadings contain all the material facts, a ruling of the court upon this motion and demurrer would be a final disposition of the case.

A brief statement of facts is necessary for a clear understanding of the questions involved: Prior to December, 1875, the property in question was owned by Philip W. Hill, and during the period from that time until April, 1878, he placed five mortgages thereon in the following order: to the Wildey Building Association No. 2 on December 15, 1875; to George H. Burgtorf, May 4, 1876; to the Wildey Building Association No.

2, July 1, 1876; to John C. Ward, August 13, 1876; and to William D. Henderson, April 26, 1878. All of these mortgages were duly recorded. It further appears that on July 14, 1877, George H. Burgtorf filed suit for a sale of this property, making the mortgagor, the building association, and Ward parties defendant therein. The building association, by an answer and cross-petition, joined in the prayer, and in July, 1878, the court ordered the master commissioner to sell the property, unless the various amounts due were paid to the mortgagees within thirty days. An appraisement and sale were duly had, and in the January term of court, 1879, the sale was duly confirmed by court, and the master commissioner was directed to convey by deed in *fee simple* lots Nos. 3 and 8 to William J. Littell, trustee of the Wildey Building Association No. 2. At the same time and in the same manner the master commissioner was directed to convey lots Nos. 2 and 7, by deed in *fee simple* to Mary Scott, the mother of the plaintiff herein. The building association deed was executed February 6, 1879, and the deed to Mary Scott on March 26, 1879, and these deeds were duly recorded.

In accordance with these proceedings and by the terms of the granting and habendum clause of the deed to Mary Scott, the property, together with all the right, title and interest of Philip W. Hill and of all other parties in the suit, was sold and conveyed to the said Mary Scott, "her heirs and assigns forever."

In accordance with these proceedings and by the terms of the granting and habendum clause of the deed to William J. Littell, trustee of the Wildey Building Association No. 2, the property, together with all the right, title and interest of Philip W. Hill and of all other parties in the suit, was sold and conveyed to the said William J. Littell, trustee of the Wildey Building Association No. 2, "his successors and assigns forever."

On March 26, 1879, William J. Littell, trustee, conveyed lots Nos. 3 and 8 to Mary Scott, the mother of the plaintiff herein. The plaintiff in the case at bar acquired title to all of this property under and by virtue of the will of her mother, Mary Scott, and the possession of herself and her mother has been actual,

1913.]

Scott v. Walker.

continuous, open, and notorious for more than twenty-one years prior to the date of the contract in question.

The further fact appears that none of the mortgages above mentioned have been canceled or released of record, and while not appearing in the pleadings the fact has been admitted by counsel that all papers and records of the foreclosure suit above mentioned were subsequently destroyed in 1884 during the court house fire, and the facts in reference thereto were obtained from recitals in the master commissioner's deeds which are in existence and were exhibited at the hearing.

At the outset we can remove one of these five mortgages from consideration, to-wit, the mortgage from Hill to Henderson, executed April 26, 1878. The foreclosure proceedings instituted by Burgtorf were commenced some nine months prior thereto, to-wit, July 14, 1877, and any right acquired by Henderson under his mortgage was acquired pending an action for the sale of same, and therefore under the doctrine of *lis pendens* it is subject to the determination of the action which was then pending and which afterwards resulted in a sale to a purchaser who took it free of the lien of such mortgage. See *Ludlow v. Executors*, 3 Ohio, 542; *Bennett v. Williams*, 5 Ohio, 462; *Roberts v. Doren*, 20 W. L. B., 397.

In plaintiff's reply it is alleged that a good and merchantable title was acquired by reason of the fact that both plaintiff and her mother had been in actual, continuous, open, notorious, and adverse possession of the property for more than twenty-one years prior to the date of contract of sale, to-wit, June, 1913. While the question does not seem to have ever been passed upon in this state, yet we believe that sound principles of law require a court of equity to refuse the enforcement of a contract for the purchase and sale of real property where the title depends upon adverse possession under a statute of limitations. The reason for this is that to sustain such claim of title by adverse possession, parole evidence would have to be introduced, which might be disputed, thereby giving rise to a question of fact, and no purchaser should be compelled to take property the possession of

which he might be obliged to defend by litigation depending upon a question of fact. *Atterbery v. Blair*, 244 Ill., 363; *Heller v. Cohen*, 154 N. Y., 299.

This brings us to the principal grounds of objection raised by the defendant, the first of which is that the four uncanceled mortgages constitute a cloud upon plaintiff's title. In connection with this objection it is urged that under the statutory law, as it existed at the time these mortgages were made and foreclosure suit instituted, it was incumbent upon the court, when the order of sale was issued or the order confirming the sale was entered, to make an additional order requiring the clerk to make an entry of release or satisfaction on the record of such mortgages, and cited in support thereof Section 2 of the act of April 16, 1872 (Vol. 69 Ohio Laws, 74), which provision is now found in substantially the same terms in Section 8552 of the General Code, which reads as follows:

"The court in which proceedings are commenced, relative to a mortgage * * * the final * * * order or decree in which is to * * * require the judicial sale of property included in the mortgage * * * in case of failure to pay the amount secured thereby * * * at the rendition of such final order or decree, shall make the necessary order for the proper entry of a memorandum, release or satisfaction, by the clerk, on the record of such mortgage." * * *

In view of the fact that these mortgages remain uncanceled, that the recitals in the master commissioner's deeds do not show the issuance of any order such as is required by the statute above quoted, and that the destruction of all the papers and records in the foreclosure case has removed any means of ascertaining whether or not such order had been made, it is now claimed that the court did not make such an order or the clerk failed to perform his duty as required by law. "This argument seems to proceed upon the theory that the cancellation of those four mortgages is of primary importance, whereas we believe that the more important question is whether or not the purchaser at the foreclosure sale took the property relieved from the lien of

1912.]

Scott v. Walker.

these mortgages. It is unfortunate, of course, that the records of this foreclosure suit have been destroyed. The Legislature, however, has recognized the difficulties arising from such a situation and has enacted statutes of a curative nature where records have been lost or destroyed; in fact, there has been an express enactment to cover just such a situation as exists in the case at bar, where the records of a sale of real property by master commissioner have been destroyed by "fire, riot, or civil commotion." Such deed of a master commissioner shall be taken as *prima facie* evidence not only of the legality and regularity of the sale, but of the correctness of the proceedings in the action growing out of which the property was sold. See Section 12349, General Code, which reads as follows:

"When real estate has been sold by a * * * master commissioner, * * * authorized by the court, and the record of the action in which such sale was made * * * is lost or destroyed by fire, riot or civil commotion, the deed of such property made by such * * * master commissioner * * * authorized by the court, shall be *prima facie* evidence of the legality and regularity of such sale, and of the correctness of the proceedings in the action or proceeding wherein the property was sold."

Under this statute the court would be justified in assuming that the proceedings in that action were correct, even perhaps to the extent of assuming that the clerk had been ordered to make an entry of cancellation upon the original records of the mortgages, which would correct the defect complained of. Aside from that however, the master commissioner in the deeds in question conveyed not only all the right, title and interest of the original mortgagor but also all the right, title and interest of all other parties in that suit, to-wit, the mortgagees Burgtorf, Ward and the building association. If all of the interest of these mortgagees has been disposed of we are unable to see what further claim or interest they can have in this property, irrespective of the question as to whether their mortgages have been canceled or not. This conclusion finds support in the funda-

mental proposition of law that when property is sold in a judicial proceeding the sale is free of the rights of all the parties to the action, and their claims continue only as against the proceeds of sale. See *Lessee v. Risk*, 15 Ohio, 84; *Freeby v. Tupper*, 15 Ohio, 468.

The first syllabus of the *Risk* case states the rule very concisely in the following language:

“When a creditor, whose debt is secured by mortgage, recovers judgment for the same debt, takes out execution, and causes the mortgaged premises to be sold, the purchaser takes an indefeasible title, although the money made is not sufficient to satisfy the entire debt.”

The next, and perhaps the most important contention of defendant, is that the deed from the master commissioner to William J. Littell, trustee of the Wildey Building Association No. 2, his successors and assigns forever, of lots Nos. 3 and 8, passed merely a life estate for the reason that a deed, in order to convey a fee simple title, should be to the grantee and to his heirs and assigns forever.

There can be no dispute that in Ohio, as at common law, the word “heirs” or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee simple estate, and that the omission of such word in the granting and habendum clause of deeds to natural persons vests in the grantee a life estate only. See *Ford v. Johnson*, 41 O. S., 366; *Brown v. Bank*, 44 O. S., 269.

However, there are certain well established exceptions to this rule, which must be considered. For instance, it has been held that a grant in real property to a corporation, not only without the word “heirs” but also without the word “successors,” would pass a fee simple on the theory that a grant to a corporation aggregate might last forever, that words of perpetuity are only necessary where the grant is to a corporation sole. See *Railway v. Bosworth*, 46 O. S., 81.

Another pronounced exception to the general rule in this state is in the case of a mortgage, where it has been held that if the

1913.]

Scott v. Walker.

language in the recitals and conditions of a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such an estate, although the word "heirs" or formal word of perpetuity is not employed. *Brown v. Bank*, 44 O. S., 269, at 276.

An equally well established exception to this general rule is that in an active trust the trustee will take that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust, or, as has been very tersely expressed:

"Thus, the trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of a life estate, or fails to use the word 'heirs.'" 28 Am. & Eng. Encyc. of Law, 2d Ed., 923.

This doctrine was announced as early as 1720 by Lord Chancellor Hardwicke. *Villiers v. Villiers*, 2 Atkyns, 72; 1 *Lewin on Trusts*, 214. See also *North v. Philbrook*, 34 Maine, 532.

This doctrine has been approved by the Supreme Court of the United States in the case of *Young v. Bradley*, 101 U. S., 782, at 785, where Justice Miller, speaking, says:

"The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose."

The federal court for the district of Ohio has adopted the same view in the case of *Young v. Mahoning County*, 53 Fed. Rep., 895, at 899, where, after announcing the general rule, Judge Taft said:

"But there is an exception to this rule when, upon the face of the deed, it appears that the conveyance is made in trust for a use, the full performance of which requires the vesting of a fee in the trustee and grantee. In such a case the deed con-

veys a fee commensurate with the necessities of the trust imposed by the terms of the deed, and this, if so conveyed, is a legal estate, and is not cognizable alone in equity."

This doctrine received early recognition by the general term of this court in the case of *Williams v. Mears*, 2 Disney, 604, at 616. In this case the deed expressly clothed the trustee with fee simple by the use of words of inheritance in the granting clause, yet the court said:

"Moreover, the duty imposed upon him to convey to the *cestui que trust* in remainder, and the power of sale, require that estate, and upon the familiar rule that a trustee takes as large an estate as may be necessary for the execution of his trust, would give him a fee *even if words of inheritance were omitted*."

Along the same general lines, see *Vaughan v. Zitscher*, 4 N.P. (N.S.), 90; *Stephenson v. Sedam*, 12 C. C., 418.

Applying this principle to the case at bar, we are obliged to examine this master commissioner's deed from its four corners to determine what character of estate it was intended to pass, and, in view of the fact that the grantee was described as trustee for the building association, to determine just what *quantum* of legal estate was necessary to discharge the duties of the trust. Here is a foreclosure proceeding, and on the answer and cross-petition of a building association, one of the mortgagees, the property is ordered sold. It is duly appraised and at the sale is bid in, not by the building association proper, but by Littell as trustee for it. It would certainly seem to be a very natural order of events for a mortgagee to buy in property at a foreclosure sale to protect its original loan upon which there had been a default. Especially is this to be expected from a building association, which is incorporated for the express purpose of loaning money on real estate as security. Now, the fact that it was bought in by an individual as trustee for the building association gives rise to a very clear implication as to the powers and duties of that trustee, for he was acting as trustee for an original mortgagee, and the duties of his trust were clearly

1913.]

Scott v. Walker.

either to subsequently turn the property over to the building association, or sell it and turn over the proceeds, a well known method resorted to in the dissolution and winding up of the affairs of building associations. Suppose Littell died before he had performed either of those duties; in such case the trust would entirely fail if only a life estate was created, and we would have the anomalous situation of the original owner becoming a remainderman after all his interest in the property had been disposed of. It is a familiar doctrine in equity that a trust shall never fail for want of a trustee, and from what has been said above it seems equally well established that a trustee will take that *quantum* of legal estate necessary to perform fully the duties of his trust, irrespective of the language by which the estate is vested in the trustee.

But we are not obliged to rest our conclusion in this branch of the case solely upon the above mentioned doctrine. We have here a master commissioner who conveys property upon order of court and who prepares a deed to the purchaser in which is set forth the names of the parties to the judgment, the substance of the order of sale and the return thereon, and the order of confirmation, all duly executed, acknowledged and recorded. The deed on its face expressly conveys all the right, title and interest of the original owner and mortgagor and of the various mortgagees, parties to the proceedings. It is admitted that the mortgagor, Philip W. Hill, was the owner of the fee simple title to this real property. What the master commissioner was ordered to convey to the purchaser and what he did convey by express words, was all that title and interest of the mortgagor, which was a fee simple title. This conclusion is inevitable, not only by reason of the express words of the deed, but by reason of the express terms of the statute thereunto pertaining, which is Section 11694, General Code, which reads as follows:

“Such deed shall be *prima facie* evidence of the legality and regularity of the sale. All the estate and interest of the person whose property the officer so professed to sell and convey, whether it existed at the time the property became liable to satisfy the

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judgment, or was acquired afterwards, shall thereby be vested in the purchaser."

The preceding statute, Section 11693, prescribes just what shall be contained in a master commissioner's deed, which are all those provisions the deed in question actually does contain. The master commissioner had only such power as the court and the statutes of Ohio gave him. That being so, he would not have had power to grant a life estate, or in fact any estate less than that owned by the party whose property was being sold. We are therefore of the opinion that a fee simple title passed to the grantee in this master commissioner's deed, and his conveyance two months later to the mother of the plaintiff herein, of all his right, title and interest in and to said property, was a conveyance to her of an estate in fee simple. The contract in question is in all respects fair and free from ambiguity, and having reached the conclusion that its enforcement as against the purchaser, will vest in her a good and marketable title, it is the duty of the court to decree a specific performance of the contract in question. See *City of Tiffin v. Shawhan*, 43 O. S., 178.

The demurrer of defendant to plaintiff's reply will therefore be overruled, and the motion of plaintiff for judgment on the pleadings will be granted.

1913.]

Cincinnati v. Railway.

**AUTHORITY OF COUNCIL TO AUTHORIZE THE BUILDING OF
— — — — — A SPUR RAILWAY TRACK.**

Common Pleas Court of Hamilton County.

THE CITY OF CINCINNATI V. THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.*

Decided, July 23, 1912.

Railways—Validity of Ordinance Granting Right to Lay Proposed Tracks Within the Municipal Limits—Sections 8895 to 8902.

1. A spur track thirty-two hundred feet long, from which numerous private sidings will branch off to nearby factories, is not a new line of railway, and authority to authorize the laying of such a track is vested by Section 8902, G. C., in the municipal council.
2. The authority of this statute is not limited to the construction of a track to a single "mill, factory or other manufacturing establishment," but is broad enough to cover the plural of these words and to include streets as well as a single street.

*Alfred Bettman, City Solicitor, for plaintiff.**Harmon, Colston, Goldsmith & Hoadly, contra.*

DICKSON, J.

The plaintiff, City of Cincinnati, a municipal corporation by its solicitor and at the request of a tax-payer, complains that its council by ordinance has attempted to grant certain rights to the defendant, the Baltimore & Ohio Southwestern Railroad Company, a railroad corporation, and says that the ordinance is void and asks that the defendant be perpetually enjoined from asserting any rights under it.

The plaintiff in its petition sets out the ordinance in full and gives in detail all of the facts upon which it relies. The defendant in detail in its answer admits practically all of the facts set

*Affirmed by the circuit court without opinion, and judgment of circuit court affirmed by the Supreme Court without opinion, *Cincinnati v. B. & O. S. W. Railway Co.*, 88 Ohio State.

out in the petition. There is no evidence. The only issue raised by the pleadings and admissions in argument is: Are the certain proposed tracks, switches, sidings, branch lines from a line of railroad to a mill, factory, or other manufacturing establishment, etc., for additional tracks to increase yard facilities or not? The plaintiff asks a judgment on the pleadings. The defendant asks a dismissal thereunder.

The facts are substantially as follows:

The ordinance, omitting certain details not necessary here, is as follows:

“An Ordinance No. 3007.

“Granting to the Baltimore & Ohio Southwestern Railroad Company permission to construct, maintain and operate an industrial siding in and across Ford street, Adelaide street, Monmouth street and Alabama avenue, and to construct two railroad tracks in and across Marquis avenue, Arlington street and Sassafras street, and in and across all intervening alleys.

“Be it ordained, by the council of the city of Cincinnati, state of Ohio.

“Section 1. That the Baltimore & Ohio Southwestern Railroad Company be, and it is hereby granted permission to lay down a railroad track connecting on the east side thereof with its main line at a point south of Colerain avenue, which track shall cross certain streets extending from Colerain avenue on the east to Spring Grove avenue on the west with a single railroad track. The purpose of constructing said track is to provide railroad facilities to certain industries located on premises fronting on said Colerain avenue and said Spring Grove avenue. The crossings referred to may be described as follows:

* * * * *

“The point of connection of said track with the main line of said railroad company and the crossings enumerated above, and the industries for which railroad facilities will be provided are shown on the blue print hereto attached and made a part hereof; and the rights and privileges herein granted are solely for the purpose of providing railroad facilities to the present and future industries locating hereafter along said track, and can not be used for any other purpose.

“Section 2. Said tracks shall be constructed under the supervision and to the satisfaction of the city engineer, and shall be so constructed as not to interfere with the ordinary use or drain-

1913.]

Cincinnati v. Railway.

age of the streets, avenues and alleys over which the same are to be constructed.

"Section 3. Said tracks shall conform to the grade of the streets, avenues and alleys over which they cross, and said railroad company shall immediately after laying said tracks thereon, restore said streets, avenues and alleys, where disturbed by it, to their present condition."

The petition states:

"That as said plat indicates, said railroad sought to be built by defendant under and by virtue of said ordinance starts from the main line of said defendant, at or near Ford street, and runs southwardly between Spring Grove avenue and Colerain avenue and parallel thereto for a distance of about thirty-two hundred (3200) feet. Plaintiff states that said ordinance provides for the building of the railroad therein described across the following streets, running eastwardly and westwardly between said Colerain avenue, and Spring Grove avenue, at the grade of said streets, said streets being each and all of them public streets and highways in and of the city of Cincinnati."

Also:

"That no railroad tracks now cross said streets at or near the points to be crossed under the provisions of said ordinance, and that Spring Grove and Colerain avenues are long, important streets and thoroughfares of the city of Cincinnati."

Upon the streets and avenues crossed by these tracks there are now located various manufacturing establishments which will be at or near to the proposed tracks. There are also on said streets and avenues various residences. It may be necessary also to construct upon private property additional tracks to reach the buildings thereon.

The petition also states:

"Second. That said railroad sought to be built, under and by virtue of said ordinance, is not a switch, siding, or branch line, or an additional track, at previously existing crossings, as provided in Section 8902 of the General Code of Ohio, and is therefore contrary to said Sections 8895 to 8901, in that said

defendant seeks to build said railroad at the grade of said streets aforesaid."

The defendant admits the passage of the ordinance, that the plat filed is correct; that the track sought to be built starts from the main line of railroad and runs southwardly between Spring Grove and Colerain avenues and parallel to them for a distance of about 3200 feet; that the track or tracks are to cross the street at grade; that there are manufacturing buildings and residences and other buildings thereon, and admits the general condition of the property abutting on the proposed track is as stated; admits also that there are on certain streets no manufacturing plants and part of the territory is vacant and unimproved and is over ten to fifteen feet below the grade of the surrounding streets; admits the description in the petition as to the factories and industrial plants in the territory in question, that the tracks will not be necessarily alongside of the manufacturing establishments; that in substance many of the manufacturing establishments must be reached by additional private tracks; and denies that the ordinance in question is invalid and void and says that the tracks are sidings and branches of a main line; that the tracks sought to be built are additional tracks thereto for the purpose of increasing the defendant's freight facilities at this terminal point—Cincinnati—and says that it has a right to build this switch system under and by virtue of the ordinance granted and enacted under Section 8902 of the Revised Statutes.

The statutes governing the issue are 8895 to 8902 inclusive of the General Code.

"Section 8895. Except as hereinafter provided, all crossings, hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof.

"Section 8896. Every railroad company building a new line of road, under its charter powers, across a highway, shall construct it above or below the grade of the highway, unless in the manner hereinafter provided, allowed to build it at grade. * * *

"Section 8897. * * * [Not necessary for the issue involved.]

1913.]

Cincinnati, v. Railway.

"Section 8898. When it is desired by a railroad company constructing a new railroad, or in changing or in altering the location of one heretofore constructed," * * * "a petition shall be presented by the party desiring such construction or diversion, to the common pleas court of the county within which the crossing or diversion is situated." * * *

"Section 8899. Such petition shall set forth the reasons that are supposed to make such change or alteration necessary or desirable;" * * * "the court shall make an order or orders permitting such crossing at a grade or diversion to be established." * * *

"Section 8900. * * * [Not necessary for the issue involved.]

"Section 8901. * * * [Not necessary for the issue involved.]

"Section 8902. Nothing in sections eighty-eight hundred and ninety-five to eighty-nine hundred and one both inclusive, shall prevent a railroad company from laying additional tracks at previously existing crossings, or from constructing switches, sidings and branch lines from their lines of road to a mill, factory, or other manufacturing establishment, or other industrial plant, or an elevator, wharf or pier, or gravel, marl, or clay bed, or any mine, or from laying additional track to increase their yard facilities at terminal or other points across public highways at the grade thereof. * * *"

Is this proposed track (or tracks) a new railroad— a new line of road and thus under the court of common pleas under Sections 8895-8901 inclusive; or are switches, sidings or branch lines from the line of a road to a mill, factory, etc., or the laying of additional tracks to increase yard facilities desired under Section 8902, General Code, thus under the municipality by its council?

Section 1 of the ordinance provides:

"That the Baltimore & Ohio Southwestern Railroad Company be and it is hereby granted permission *to lay down a railroad track connecting on the east side thereof with its main line,*" and the track is to cross certain designated streets.

"The purpose of constructing said track is *to provide railroad facilities to certain industries* located on premises fronting on said Colerain avenue and Spring Grove avenue."

"And which track will cross certain of said streets with a double track."

Also:

"And the rights and privileges herein granted are *solely* for the purpose of *providing railroad facilities* to the *present* and *future industries* locating hereafter along said track *and can not be used for any other purpose.*"

"Section 2. Said track shall be constructed under the supervision and to the satisfaction of the city engineer and shall be so constructed as not to interfere with the ordinary use or drainage of the streets, avenues and alleys over which the same are to be constructed."

From the stated facts in the pleadings the court is of the opinion that the proposed track (or tracks) is not a new line of road, and therefore not governed by Sections 8895-8901 inclusive, but that the tracks are under the exceptions to these sections and governed by Section 8902 and under the care and control and subject to the government of the city by its council.

The court is also of the opinion that the language and intent of the statutes is broad enough to mean and include the plural of mill, factory and other manufacturing establishment, etc., as well as the singular.

The court is also of the opinion that the language and intent of the statute is broad enough to mean and to include streets as well as street.

All of the equities are with the defendant and the petition will be dismissed.

1913.]

Estate of Costanzo.

**RIGHT TO ADMINISTER THE ESTATE OF A DECEASED
ITALIAN.**

Probate Court of Cuyahoga County.

IN RE ESTATE OF SAVARIO COSTANZO, DECEASED; APPLICATION FOR
LETTERS OF ADMINISTRATION.

Decided, November 1, 1912.

Estates of Decedents—Claim of Heir of a Deceased Italian to Appointment as Administrator as Against the Italian Consul—Provisions of the Italian and Swedish Treaties.

1. Where the applicants for appointment as administrator of the estate of a deceased Italian are the Italian consul on the one hand, and on the other a stranger who is acceptable to ineligible heirs of the decedent who are residents of this country, the choice is entirely a matter of discretion on the part of the probate judge.
2. But where an heir of the decedent is eligible to appointment, his claim thereto is superior to that of the Italian consul, and letters must of necessity be issued to him.

Anthony Gaughan, B. D. Nicola and J. V. Zottarelli, for the heirs.

Henry F. Payer, for the Italian Consul.

HADDEN, J.

The question involved in this case is the right of the Italian Consul to be appointed administrator of one of his deceased countrymen, who has a minor son and heir living in this country, as well as a minor son and wife in Italy, as against a stranger who is acceptable to the son living in this country. The question is raised upon the applications of Pasquale Coreno and Nicola Cerri, a consular agent for Italy in this city. The application of Pasquale Coreno filed on the 29th day of November, 1911, avers that Savario Costanzo died on the 27th day of November, leaving Angela Costanzo his widow, Antonio Costanzo, son six years of age, both living in Italy, and John Costanzo, a son fourteen years of age, and James Costanzo, a brother, the latter two living in Cleveland, Ohio; and that the whole personal

estate of said decedent consists of wages due from the Lake Shore & Michigan Southern Railroad Co. and money in the hands of the Hogan Co., the probable value of which will not exceed \$100. The averment as to the real estate is that it consists of nothing.

The application of Dr. Cerri, filed December 11, 1911, is substantially the same with the exception that it omits James Costanzo, a brother mentioned in the previous application, from the list of next of kin, and in addition to the personal estate mentioned, Dr. Cerri states that there is an unliquidated claim for wrongfully causing the death of the decedent against the Big Four Railroad and others. The attorney for Pasquale Coreno contends that an unliquidated claim for damages is not assets of an estate, and therefore the appointment of an administrator can not be justified in cases where there is only a claim for wrongfully causing death.

The court is not at this point prepared to say how much weight should be given to this argument, for it appears from both applications that there is personal property besides this unliquidated claim for damages. Such personal property amounts to about \$100, and it is the opinion of this court that that alone justifies the appointment of an administrator without going into the moot question of whether such appointment would be justified where there was no personal property except the claim for wrongfully causing death.

The rule heretofore adopted by this court as to the right of the appointment of the Italian consular agent in cases of this kind has been materially modified by the case of *Rocca v. Thompson*, 223 U. S., 317. The court there held that the provisions of the Argentine treaty, which are generally considered as being applicable to the Italian treaty, were not as sweeping as had been thought, but that it merely gave the consular agent the right to protect the interests of his nationals in the administration of his estate, join in the proceedings for administration, or take possession of the decedent's goods temporarily.

The Supreme Court of the United States in this case denied the right of the Italian Consul to be appointed administrator of an estate of any Italian subject as against the public adminis-

1913.]

Estate of Costanzo.

trator of the state of California. The consular agent in the case under consideration however, does not rely upon the provisions of the Argentine treaty, but he here claims under the provisions of the Swedish treaty, which was promulgated March 20, 1911.

The provisions of the treaty between the United States and Italy proclaimed September 27, 1878, in Articles 16 and 17, read as follows:

“Article 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls, or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

“Article 17. The respective consuls general, consuls, vice-consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation.”

Of course it is not contended for a minute by the consular agent that he gets his right for the appointment in this case from the specific terms of this treaty, but he claims that under the terms of Article 17, he is entitled to the rights, prerogatives and privileges which are granted to consular agents of the most favored nation, and he claims that Sweden, by virtue of the treaty of 1911, was designated as a more favored nation than Italy in this respect, and that he is therefore entitled to the same privileges as the Swedish consular officer would be in the same situation.

Article 14 of the Swedish treaty reads as follows:

“In case of the death of any citizen of Sweden in the United States, or of any citizen of the United States in the Kingdom of Sweden, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

"In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul-general, consul, vice-consul-general, of vice-consul of the nation to which the deceased may belong, or in his absence the representative of such consul-general, consul, vice-consul general, or vice-consul, shall so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.

"It is understood that when, under the provisions of this article, any consul-general, consul, vice-consul-general, or vice-consul, or the representative of each or either, is acting as executor or administrator of the estate of one of his deceased nationals, said officer or his representative shall, in all matters connected with, relating to, or growing out of the settlement of such estates, be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity whatsoever.

"The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise, and their representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may in accordance with and acting under the provisions of the laws of the jurisdiction in which the property is found take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases.

"As for real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation."

The first question then presented to the court is whether the terms of the Swedish treaty must be considered as having been virtually incorporated into the Italian treaty by virtue of the most favored nation. That it is so incorporated is attacked by attorney for Coreno, on the ground that the right given to the Swedish consular officers was not a privilege or a favor, but

1913.]

Estate of Costanzo.

it was a bargain given for value and Italy should not be allowed to have the advantage of the bargain without paying the same price.

In my view of the case it is not necessary to go into the question, but I might say in passing that this presents an exceedingly close question. All the authorities cited as bearing out the contention of the Italian consular agent are based upon *In re Fattosini*, 67 N. Y. Supp., 1119. The reasoning in that case is very meager and unsatisfactory, so that the doctrine of the applicability of the most favored nation clause in such a case rests upon a very insecure foundation, when compared with the reasoning of Caleb R. Cushing, 6 Op. of Attorney-general, 148, in an analogous case, namely, that of the consular agent's right to demand the surrender of deserting seamen from an alien ship. The cases of *Rocca v. Thompson*, 223 U. S., 317; *Ship James & William v. U. S.*, 37 Ct. of Claims, 303; *Thingvalla Line v. U. S.*, 24 Ct. of Claims, 255; *Bertram v. Robertson*, 122 U. S., 116; *Whitney v. Robertson*, 124 U. S., 190; and the scholarly article of Stanley K. Hornbeck on the most Favored Nation Clause in 3 *American Journal of International Law*, 395, 619, 797, all intimate the opposite of the doctrine above set forth.

But however that may be, a decision of that question is not necessary in the present case. For the purpose of this case we may assume that the clause does not apply and rest the decision on other grounds.

It will be noticed that the clause "shall * * * have the right to be appointed as administrator of such estate" in the Swedish treaty is qualified and limited by the clause "so far as the laws of each country will permit." This idea is also carried out in the next paragraph which provides that if the consular agent is acting as administrator of the estate of one of his deceased nationals he shall "be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity whatsoever." It is also plainly seen that the United States Supreme Court does

not favor a construction of a treaty so as to take away from the right of administration, unless the treaty clearly warrants it (*Rocca v. Thompson*, 223 U. S., 317). It is therefore plainly evident that the Swedish treaty does not displace the administration laws of Ohio, but rather that it affirms them and makes itself subordinate to them.

What then is the meaning of the clause "shall * * * have the right to be appointed as administrator of such estate"? The statute governing the appointment of an administrator in Ohio is Section 10617, General Code. This provides that the husband or widow of the deceased shall have the first right to be appointed then comes the next of kin; next comes creditors; and lastly such person as the court shall deem fit. Reading the treaty in connection with this statute it is plainly to be seen that the right of the consular agent is postponed to the third class. In other words, a husband or widow, next of kin who are competent, and creditors, all have a prior right, and the consular agent stands in the same situation as a stranger to the estate and he can only demand that he be not discriminated against because he is a foreigner or the representative of a foreign government.

The case of *In re Estate of Cornelo Guerrieri*, from Newark, says N. J., and cited by the attorney for Cerri, seems to take much the same view of it, for in the course of the opinion Martin, J., says:

"This (meaning clause of treaty) seems to qualify them (consuls) as proper parties to receive letters of administration. It does not exclude others ordinarily entitled to letters. * * * It would seem that the statement in the fourteenth article of the treaty with Sweden meant to add the right to be classed as one of those entitled to administration on the estate of decedents described in the article."

And the ground for the appointment of the consular agent in that case was that none of the others entitled to it have claimed the right.

I have, of course, not been unmindful of the fact that a treaty may supersede a state law. But it must be clearly shown that the treaty meant to conflict with the state law, and where

1913.]

Estate of Costanzo.

as here, the treaty specifically states that it is in conformity with state law it can not be urged that the law of the state is not applicable.

To recapitulate then it is evident that in the absence of any treaty between the United States and Italy, the Italian consular agent would not be entitled as of right to letters of administration upon the estate of his deceased nationals. It is likewise true that under the Italian treaty of 1878 he does not get that right. And further, even if the most favored nation clause of the Italian treaty applies, he does not get that right under the Swedish treaty, since that is only applicable so far as the laws of the country permit, which would put the consular agent in the fourth class of Section 10617.

I am therefore of the opinion that it is entirely discretionary with the court as to who shall be appointed administrator of this estate since both applicants are strangers to the estate. Looking therefore to the qualifications and fitness of the two applicants, I am disposed to grant Cerri's application and he will be appointed upon his giving a bond in a sufficient amount.

IN RE ESTATE OF CELESTE ANDREANO; APPLICATION FOR LETTERS.
OF ADMINISTRATION.

The question presented in this case is very similar to the one presented in the Costanzo case. On the 19th day of August, 1912, Giovanni Andreano filed an application for letters of administration upon the estate of Celeste Andreano, alleging that Celeste died on or about the third day of August, 1912, intestate, leaving no widow, but two brothers, three sisters and a father. According to the application, one of the brothers, Giovanni Andreano, the applicant in this case, is a resident of Cleveland, Ohio, and one of the sisters, Rosina Andemo Di Michele, lives at Hudson, Ohio, while the rest of the next of kin are residents of Rionero, Sammitico, Italy. The application further alleges that the whole personal estate of said decedent consists of a claim for wrongful death against the Cleveland & Pittsburgh Railroad Co. the probable value of which will not exceed \$100.

A similar application was also filed by Nicola Cerri setting forth substantially the same facts. The question thus presented is, whether the Italian consular agent is entitled to be appointed as administrator of the estate of a deceased Italian citizen who has next of kin living in this country, who are competent under our laws to be appointed. As will be noticed this question is not exactly the same as the one presented in the Costanzo case, for there the next of kin living in this country were ineligible to be appointed administrator, but the same reasoning used reaching the result in that case will also apply in this. That in a shortened form was as follows:

If there were no treaty between the United States and Italy, the Italian consular agent could not ask for this appointment, inasmuch as our laws would govern; but there is a treaty between the United States and Italy, made in 1878, which however in so many words does not govern the particular phase of this situation. It is therefore clear that the consular agent must claim this appointment under some other rights than that of the Italian treaty. He makes his claim under the provisions of the Swedish treaty, proclaimed in March, 1911, claiming that the most favored nation clause of the Italian treaty of 1878 carries with it the provisions of the Swedish treaty on this subject. As I showed in the Costanzo case, I am of the opinion that the Swedish treaty does not give the Swedish consular agents as broad a right as the Italian consular agent here claims for it; assuming then for the purpose of this opinion that the most favored nation clause of the Italian treaty does include the provisions of the Swedish treaty, I am of the opinion that the Swedish treaty did not mean to abrogate the state law, but was made in accordance with it, as is plainly shown by the wording of the fourteenth section. It would therefore follow that Section 10617, General Code, of the laws of Ohio is still in force, even under the provisions of the Swedish treaty, and the Swedish consular agent would come in under the fourth class mentioned in that section; this section provides that the husband or widow of the deceased shall have the first right to be appointed administrator, after that come the next of kin, thirdly

1913.]

State, ex rel, v. Struble et al.

come creditors, and fourth come those who in the absence of any of the other three classes who do not desire administration, the court shall deem fit.

It is plainly to be seen here that the Swedish consular agent, and therefore the Italian consular agent who claims the same rights, would come within the fourth class, while the other applicant in this case comes within the second class, being a brother of the decedent and in the absence of wife and children, a next of kin, and he therefore has a better claim than the consular agent and the court must of necessity appoint him.

DISTRIBUTION OF SURPLUS OF SHEEP FUND.

Common Pleas Court of Hamilton County.

STATE OF OHIO, ON RELATION OF THOMAS L. POGUE, PROSECUTING ATTORNEY OF HAMILTON COUNTY, v. STANLEY STRUBLE, H. H. LIPPELMANN AND WALTER L. COMER, COMMISSIONERS, ET AL.

Decided, August, 1913.

Constitutional Law—Validity of the Statutory Provision for Applying Surplus From the Sheep Fund to Aid Societies for Prevention of Cruelty.

The provision of Section 5653, General Code, for the distribution by the county commissioners of a portion of the surplus from the sheep fund by transferring it to the society for the prevention of cruelty to children and animals, is not an application of public funds for a private purpose, but is within the limitations of the state Constitution in that respect.

Pogue, Hoffheimer & Pogue, E. B. Gregg and E. P. Bradstreet, for the demurrer.

Pogue, Campbell & Groom, contra.

GEOGHEGAN, J.

On demurrer to petition.

The petition herein is filed by Thomas L. Pogue, Prosecuting Attorney of Hamilton County, in his official capacity, against the county commissioners, the auditor and the treasurer of Hamilton county. It recites that the board of county commissioners on the 4th day of June, 1913, adopted a resolution wherein they authorized and directed the county auditor to draw a warrant on the county treasurer, in favor of the treasurer of the Ohio Humane Society at Cincinnati, in the sum of \$3,000, and in favor of the treasurer of Hamilton County Society for the Prevention of Cruelty to Animals at Cincinnati, in the sum of \$1,500, payable out of the woolgrowers fund, as provided in Section 2833, Revised Statutes of Ohio. The petition further recites that the Ohio Humane Society is a private corporation not for profit, organized under the laws of Ohio, and that one of its purposes is to prevent cruelty to children and animals and that said society has an agent in Hamilton county, appointed in pursuance of law, that the said Hamilton County Society for the Prevention of Cruelty to Animals is a private corporation not for profit, organized under the laws of Ohio for the purpose of preventing cruelty to animals in Hamilton county and has an agent in said county appointed in pursuance of law; that the provision of Section 2833, Revised Statutes, now Section 5653, General Code, pretending to grant the county commissioners authority to transfer and dispose of the surplus or excess of the fund created under the provisions of Section 5652, General Code, by giving all or a part of the excess of said fund as provided in Section 5653, General Code, to a society for the prevention of cruelty to children and animals, is unconstitutional and void, being in violation of Article I, Sections 1, 2 and 19, and Article II, Section 1, of the Constitution of the State of Ohio; and he asks for an injunction to restrain the aforesaid county officials from proceeding to so disburse said public funds.

For a second cause of action the petition recites that the Hamilton County Society for the Prevention of Cruelty to Animals was organized and incorporated for the purpose of preventing cruelty to animals only and not for the purpose of

1913.]

State, ex rel, v. Struble et al.

preventing cruelty to children and animals and therefore does not come within the terms and provisions of Section 5653, General Code, as aforesaid.

However, upon the hearing of this demurrer, the assistant prosecuting attorney, who presented this case, after inspection of the charter of the Hamilton County Society for the Prevention of Cruelty to Animals, conceded that the petition was erroneous in so far as the allegations contained in the second cause of action were concerned and therefore withdrew same and consented that the demurrer might be heard as if the first cause of action constituted the entire petition in the case.

The contention made by the prosecuting attorney is that the act passed by the Legislature, providing for the distribution of the excess of the fund obtained by what is commonly known as the special tax on dogs to humane societies, was an application of public funds to private purposes and therefore wholly unconstitutional and ineffectual.

In order that a better understanding may be had of the point involved, a quotation of Sections 5652 and 5653, General Code, seems advisable.

Section 5652 reads as follows:

“In addition to the proper tax on any valuation that is fixed upon dogs by the owners, which shall be included with the personal property valuation and taxed therewith, the auditor shall levy against the owner thereof one dollar on each male and spayed female dog, and two dollars on each unspayed female dog. The receipts from such tax shall constitute a special fund to be disposed of in the payment of sheep claims, as provided by law.”

Section 5653 reads as follows:

“After paying all such sheep claims, at the June session of the county commissioners, if there remain more than one thousand dollars of such fund, the excess, at such June session, shall be transferred and disposed of as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law,

all or such portion of such excess as the county commissioners deem necessary for the uses and purposes of such society, by order of the commissioners and upon the warrant of the county auditor, shall be paid to the treasurer of such society, and any surplus not so transferred may be transferred to the school fund, the poor fund, or the road and bridge fund at the direction of the county commissioners."

It is conceded by the county prosecutor that the societies referred to above as being the proposed beneficiaries of the contemplated action of the county commissioners herein sought to be enjoined have been created and are organized under the laws of Ohio as are found and are embraced within Sections 10062 to 10076, General Code, inclusive, which in substance provide for the creation of societies for the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals, the acquirement of propetry, the election of officers, the employment of agents whose appointment shall be approved by the mayor of the municipal corporation, or, in case the society exists outside of the city or village, by the approval of the probate judge, both of which officers shall keep a record of such appointments, and the act further provides for certain salaries to be paid by the city, the village and the county, and the powers and duties and fees of said officers and agents.

It may be said at the outset that legislation providing for a per capita tax on dogs is not inhibited by the Constitution, and where its purpose is the protection of woolgrowers it is an exercise of police power and not the taxing power vested in the General Assembly. *Holst v. Roe*, 39 Ohio State, 340; *Van Horn v. People*, 46 Mich., 183; *Mitchell v. Williams*, 2 Ind., 62; *McGlone v. Womack*, 17 L. R. A. (N. S.), 855 (Court of Appeals of Kentucky); *Cole v. Hall*, 103 Ill., 31; *Tenney v. Lenz*, 16 Wis., 566.

It is not seriously contended that there is any objection on constitutional grounds to the creation of the fund, nor is there any objection to be made to the payment out of this fund of claims for damages done to sheep by dogs. The only question

1913.]

State, ex rel, v. Struble et al.

that does arise upon this demurrer is the question as to the right of the county commissioners to dispose of the surplus of this fund after the payment of the damage claims of sheep owners.

The Supreme Court of Michigan, in the case of *Van Horn v. People, supra*, recognize the right of the Legislature to encourage the raising of sheep by providing a special tax or license upon dogs over and above the tax that is placed upon them according to their valuation as property, and the further right of the proper authorities to distribute this fund in the encouragement of the sheep raising industry to the redress of those private individuals who being engaged in that industry have been injured by dogs. It must necessarily follow as a corollary to that proposition that if it be conceded that the inculcation and promotion of humane principles and the prevention of cruelty to dumb animals and children is a public purpose, the Legislature has the right to devote public funds to that purpose and that it has a right to do this through agencies the creation of which it authorizes for that very purpose.

It would be difficult to point out a vital distinction between the promotion of a purely agricultural interest and the promotion of an interest in which all the public is more directly concerned, to-wit: those principles of common humanity which require that children and dumb brutes shall not be needlessly and unconscionably tortured and oppressed.

That the incorporation and fostering of humane societies are for purposes of purely public charity seems to be unquestionable. The objects and purposes of these societies are clearly set forth in the statute as "the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals."

It has been repeatedly held that the prevention of cruelty to the lower order of animals is a good and charitable purpose. *Marsh v. Means*, 3 Jur., 790; *Obert v. Barrow*, 35 Chancery Div., 472. And in the case of *Massachusetts S. P. C. A. v. Boston*, 142 Mass., 24, at page 27. the court, in discussing the nature of a society which was incorporated under an act substantially the same as the Ohio act, uses the following language:

"The society may be properly defined as both benevolent and charitable. By the St. of 1868, c. 212, Section 8, all fines collected upon 'the complaint or information or any officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals, under this act, shall inure and be paid over to said society in aid of the benevolent objects for which it was incorporated.' The same section is re-enacted in the Statute of 1869, c. 344, Section 7. In terms, therefore, the Legislature has recognized the objects of the society as 'benevolent.'

"Without discussing the question whether the word 'benevolent' is used as substantially synonymous with 'charitable,' or disjunctively, we are of opinion that the society also comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members; its work, in the education of mankind in the proper treatment of domestic animals, is instruction in one of the duties incumbent on us as human beings. There are charitable societies whose objects are to bring mankind under the influence of humanity, education and religion."

In fact, the county prosecutor concedes that the object of this society is benevolent and charitable, but argues that as its creation is purely private there is no right existing in the Legislature to disburse public funds to private individuals, and relies largely upon the authority of *Auditor of Lucas County v. State, ex rel*, 75 Ohio State, 114, commonly known as the "Blind Pension Act" case. However, there is a vast distinction between the Lucas county case and the case at bar in that in the former case the Legislature arbitrarily undertook to create a class of individuals and to them distribute certain funds of the public that were raised by general taxation. In the case at bar the Legislature has as a result of the exercise of the police power produced revenue which may be more than sufficient for the purpose for which it was intended, to-wit. the protection of wool-growers in their property and the redress of injuries done to it. What objection can there be to the employment of that surplus in the performance of that work of public charity, to-wit, the inculcation of humane principles in the care and treatment of children and dumb animals, under direction of societies or-

1913.]

State, ex rel, v. Struble et al.

ganized under the general law for that purpose whose active agents are appointed and approved by the mayor or probate judge as the case may be. It is simply providing a method of doing work through private agencies created under general laws for specific public purposes, which the state itself might do through the instrumentality of public officers.

There is no attempt made here arbitrarily to create a class of individuals and distribute state funds to them for their own uses as was attempted to be done by the legislation known as the "Blind Pension Act."

I think these societies clearly come within the view of purely public charities of a general nature as laid down by the Supreme Court of Massachusetts in the Boston case, *supra*.

The argument of the county prosecutor that the Legislature has provided no safeguards to see that this fund is properly distributed can have no effect upon the question as to the constitutionality of the act. It is not for this court to criticise the wisdom of any legislative act. It is the duty of this court in a proper case to determine whether or not an act is in conformity with the Constitution of the state and therein this court's duty ends, and if the Legislature has not seen fit to throw proper safeguards about the administration of public funds the fault is that of the Legislature alone and there is no corrective power vested in the court.

I am therefore of the opinion that the Legislature in passing the act now known as Section 5653, General Code, did not exceed its constitutional powers in providing that the excess of the fund obtained from the special tax on dogs over and above the amount paid out for sheep claims should be paid to the humane societies duly organized under the law. I would not be justified in coming to any other conclusion in view of the language of the Supreme Court of Ohio, in the case of *State of Ohio, ex rel, v. Ferris*, 53 Ohio State, 314, wherein the first syllabus is as follows:

"Funds raised by the taxation of franchises, rights and privileges, may be applied to purposes of general revenue, or any other purpose authorized by statute."

And at page 327, wherein the court says:

“The Constitution is silent as to the application of the fund arising on taxation on subjects other than property. The Constitution being silent, it follows that if such taxes can be levied and collected at all, that their application is within the sole and exclusive power and discretion of the General Assembly.”

If there is any limitation upon this power it is that the fund shall be applied to a public purpose. That the purposes of these humane societies are public purposes is amply evidenced by the statute under which they are created and the general objects of humanity which they promote. It is immaterial that they are purely private corporations not for profit, for I am aware of no restriction upon the state exercising public functions through private agencies as long as these functions are public.

The demurrer will therefore be sustained.

1913.]

Railway v. Springfield.

STREET ASSESSMENTS AGAINST INTERURBAN RAILWAY.

Common Pleas Court of Clark County.

**THE SPRINGFIELD & WASHINGTON RAILWAY COMPANY V. CITY OF
SPRINGFIELD ET AL.***

Decided, June, 1913.

*Interurban Railways—Location of Tracks and Street Improvement
Assessment on Portion of Highway Annexed to Municipality.*

The council of the city of Springfield granted an interurban railway company a franchise for the location, construction, maintenance and operation of a line of street railway along and upon certain designated streets of said city, one of which streets extended to the corporation line thereof, with the right to extend said line of railway beyond the corporation limits of said city, providing by the franchise that, whenever the city authorities should order the paving or other improvement of any of said designated streets within the city limits, the cost of such paving between the rails of the railway track and for the space of eighteen inches immediately outside of such rails should be assessed against said company.

Shortly after obtaining this franchise said company procured from the county commissioners of the county within which said city is located a franchise authorizing the company to locate, construct, maintain and operate for the period of thirty years a line of interurban railway in continuation and extension of said line of railway to be so located in said city and connecting therewith at said terminus of the line in said city at said corporation limits, such line of railway outside of the city for a specified distance to be located on and occupy a strip of the highway on one side thereof, the highway to be macademized and the space between the rails and for eighteen inches outside thereof to be macadamized, bouldered or graveled and kept in good repair by the company.

*This case was taken on appeal by the city of Springfield to the court of appeals and that court on December 11, 1913, adopted the opinion of Judge Hagan in the following memorandum:

"Full examination of the questions submitted for our consideration in this case, leads us to the same conclusion that was reached in the court of common pleas and the very full and able opinion of Judge Hagan, filed in that case, expresses our conclusions completely on all the issues raised in this case and we adopt it in full as the opinion of of this court."

After said railway line had been constructed and put in operation on said streets in said city and on said portion of the highway outside of the said city, the corporate limits of said city were extended so as to include within the corporation said portion of said highway on which the railway line had been constructed under the grant of the said commissioners and to be so improved as above stated, and subsequently the said city ordered the paving of said portion of said highway outside of said city limits and that the cost of such paving between the rails of the said company and the space of eighteen inches outside thereof should be assessed against said company, and was about to take up, remove and re-locate the tracks of said company for the purpose of such paving.

An injunction was sought by the company to prevent such assessment against it and also to prevent the said city from so taking up, removing and re-locating its tracks. *Held:*

1. An injunction will be granted said company against said city to prevent the assessment of such cost of paving against the company.
2. An injunction to prevent said city from taking up and re-locating the tracks of the company for the purpose of such paving will be refused.

Keifer & Keifer, for plaintiff.

H. E. MacGregor, City Solicitor, contra.

HAGAN, J.

A demurrer was filed by the defendant, the city of Springfield, to the original petition in this case on the ground that it did not state facts sufficient to constitute a cause of action. Subsequently this demurrer was withdrawn, an amended petition of the plaintiff was filed and an answer thereto on behalf of said city was also filed and certain franchises described in the petition were offered in evidence so that the whole case might be determined on its merits, and the case was then submitted to the court upon the pleadings and evidence.

The plaintiff, the Springfield & Washington Railway Company, alleges in substance that it is an interurban railway company extending from a point within the city of Springfield, Clark county, Ohio, to the village of South Charleston, in the same county; that its line of road extends along south Limestone street in said city of Springfield. from Parkwood avenue south

1913.]

Railway v. Springfield.

to Leffel lane to the present corporation line of said city; that the plaintiff obtained the right to construct, maintain and operate its said road from the south corporation line of said city, as such line existed in the year 1908, which former corporation line was south of said Parkwood avenue and along and upon the Clifton pike, beyond the said former corporation limits of the said city of Springfield, by a franchise legally granted plaintiff by the board of county commissioners of Clark county, Ohio, on the 9th day of December, 1908, which franchise, by its terms, was made operative for the term of thirty years from said day; that by the terms of said franchise it was authorized to construct its line of railway from the said former corporation line in said city of Springfield to a point twenty-eight rods south of the south line of Leffel lane, inside of a twelve foot strip, the west line of which shall be five feet east from the center of said pike, and on the Clifton pike south of a point twenty-eight rods south of the south line of Leffel lane, not nearer than twenty feet from the center line of said pike to the center line of said railway, but at the south end of said twelve foot strip, said railway to run on a convenient curve until the center line of the track shall be at least twenty feet east from the center line of said pike, but the center line of said track to be twenty feet distant from the center line of the pike within ten rods from the south end of said twelve foot strip, and at Mill Creek Road the railway to be on a convenient curve to the left from its line along the Clifton pike to the present line of railway of said company on the south side of said Mill Creek road.

It is alleged in the petition and admitted in the answer that after said franchises were granted by the board of county commissioners and the city of Springfield, to-wit, in the year 1910, the south corporation line of the city of Springfield was changed to Leffel lane, so that the portion of the said railway above described is now within the south corporation line of the city of Springfield and the said portion of the Clifton pike, above described, is now known as Limestone street.

It is further alleged in the petition that the city of Springfield, through its council, has taken steps to pave and has determined to proceed with the paving of Limestone street from the

south corporation line, as it existed in 1908, south to Leffel lane and has entered into a contract with the defendant, Edward Ryan, to pave said street with sheet asphalt, and for the purpose of paving said street proposes and threatens to require plaintiff to pave or to pay the costs of paving that portion of South Limestone street between its tracks and eighteen inches on each side thereof from the said former south corporation line to the present south corporation line; that the defendants, the city of Springfield and Edward Ryan, are proposing and threatening to tear up and destroy the railway tracks of the plaintiff along that portion of South Limestone street between the said former and present south corporation line and to require the plaintiff to re-locate and reconstruct its tracks on a different location from that one which it was granted by the said board of county commissioners.

It is further alleged in the petition that if the said defendants are allowed to proceed as proposed and threatened, as aforesaid, the operation of the said railway of plaintiff will be interfered with and prevented to the great and irreparable damage of the plaintiff and the public, who use said line of railway for passenger and freight service. The prayer of the petition is that the defendants be enjoined from tearing up plaintiff's tracks, as threatened by them, or from interfering with the same or with the operation of plaintiff's line of railway along said street and from requiring the plaintiff to change or re-locate its said tracks upon said portion of said Limestone street, and from requiring plaintiff to pay for any portion of the paving of South Limestone street.

All the foregoing allegations of the petition are admitted in the answer of the defendant, the city of Springfield, except that it denies that said franchise granted by the county commissioners is in full force and effect, and admitting it is proposed to take up said track denies that it threatens or intends to destroy the same.

It appears by the terms of said franchise that said company was required to macadamize said pike along the west side of the present macadamized portion of Clifton pike from the corporation line south to a point twenty-eight rods south of the

1913.]

Railway v. Springfield.

south line of Leffel lane, so as to make the macadamized roadway of the same character as the (then) present roadway of the width of twenty-two feet west of and along the west side of said twelve foot strip and the spaces between the rails of said company and for eighteen inches on the outside of the outer rails within the said improved portion of the highway shall be macadamized, planked, bouldered or graveled level with the top of the rail under the direction of the county commissioners, the same to be kept in good repair by said company as long as the said company operates its said line, in default of which the board of county commissioners reserve the right to repair the same at the expense of the said company.

It is alleged in the answer of the defendant, the city of Springfield, that by the terms of said ordinance the rights and privileges thereby granted were to be subject to the laws of the state of Ohio and to the provisions of the existing or future ordinances of the said city relative to the construction and operation of street railways within its limits so far as the same are applicable and not inconsistent with the provisions of this ordinance.

It is further alleged in the answer of the city of Springfield that on the 6th day of November, 1908, it granted a franchise by Ordinance No. 813 to the said the Springfield & Washington Railway Company to maintain and operate a street railway and interurban railway upon certain streets of the city of Springfield, Ohio, with the right to extend the same beyond the corporate limits of said city.

Said answer then sets out Section No. 1 of said ordinance, which in substance is that the plaintiff is granted the right to construct, maintain and operate a single or double track street railway within the limits of said city, with the necessary side-tracks, cross-overs, turn-outs, poles, wires, etc., over the following streets and avenues of said city, viz.: on Wittenberg avenue from the tracks of the Springfield & Xenia Railway Company at Clark street to the south end of said Wittenberg avenue; on Parkwood avenue from the west end of the same to Limestone street; on Limestone street from Parkwood avenue to the south corporation line of said city; that the track on said route shall be of uniform guage of four feet eight and one-half inches

and be located as nearly in the center of the streets as may be practicable; that whenever any portion of the said streets, described above, is ordered paved or otherwise improved by the lawful authority, the city may pave or otherwise improve the spaces between the rails and the spaces between any tracks or siding, switches or turn-outs, together with eighteen inches on the outside of the outer rails thereof on that portion of said street ordered to be paved or otherwise improved, the cost thereof to be assessed against the said company, in the same manner as against abutting property owners and the payment thereof enforced as other municipal assessments. And that before any such pavement is put in the company shall lay their ties on a solid foundation and shall use such rails as shall conform to the style of paving then being put in, to the approval of the proper municipal authority.

Said answer further alleges that by Section 1 the rights and privileges thereby granted are subject to the laws of the state of Ohio and to the provisions of the existing and future ordinances of the said city relating to the construction and operation of street railways within its limits so far as the same are applicable and not inconsistent with the provisions of this ordinance.

Said answer alleges that by virtue of the terms and conditions of said ordinance it has the right to pave and otherwise improve the space between the rails of said portion of plaintiff's railway track on said part of South Limestone street, together with eighteen inches on the outside of the outer rails thereof on said portion of South Limestone street and to so pave and improve said street that it may remove and relocate plaintiff's said track to such point in said street and in such manner as may be necessary in order to properly pave and otherwise improve said street without unnecessary interference with plaintiff's rights in said street and without destroying any of plaintiff's property.

It appears from the evidence that the cost of paving that portion of the said route of the plaintiff described in the petition necessary to laying the proper foundation and the brick thereon would be about \$8,500, exclusive of any cost which might be nec-

1913.]

Railway v. Springfield.

essary to re-locate and reconstruct the tracks of plaintiff in accordance with such pavement of the street.

The court finds from the admissions of the answer and the evidence submitted that the material allegations of fact in plaintiff's petition are true; that is to say, that the allegations of the petition which set forth the nature of the franchise obtained by the plaintiff are established by the evidence, and that the particular manner in which the plaintiff was to maintain the portion of said route is as already set forth above in the opinion. The court further finds that the allegations of fact in the answer of the defendant, the city of Springfield, in regard to the particular terms of said franchise are true, though somewhat fuller than those alleged in the petition, and that the allegations of the answer as to said several ordinances and the terms thereof passed by said city council are true. The court is of the opinion that there are no material questions of fact between the parties in dispute and that, therefore, the whole controversy is to be determined as a matter of law.

The plaintiff, being an interurban railway company, its said line, under the classification made under Chapter 10 of the General Code of Ohio, Sections 9100-9149, inclusive, such railway is classed as a street railway, which classification is sustained in a recent opinion of the Supreme Court of our state in the case of *Ottawa v. Electric Railway Co.*, 85 Ohio State, 229.

In the consideration of the questions presented it is helpful to have in mind certain fundamental principles, as below stated:

A franchise granted to a public service corporation is a contract. *Railway Co. v. Cleveland*, 17 O. Dec., 770; *Railway Co. v. Carthage*, 36 O. S., 631; *Cin'ti St. Ry. Co. v. Smith*, 29 O. S., 291; *R. R. Co. v. Cleveland*, 7 N.P.(N.S.), 161; *Chicago v. Sheldon*, 9 Wallace, 50.

A franchise duly granted by the county commissioners is valid and no amendment or alteration thereof can be made which takes away the rights vested thereby. *State, ex rel Krichbaum, v. Northern Ohio Ry. Co.*, 1st Ohio Court of Appeals, page 1 (Ohio Law Reporter, March 31, 1913).

The validity of a grant for a street railway made by the county commissioners upon a road through unincorporated ter-

ritory is not affected by the subsequent annexation of said territory to a municipality. *Bell v. Glenville, etc., Ry. Co.*, 5 C. C. (N. S.), 461 (affirmed 73 O. S., 392).

The overwhelming weight of authority is that in the absence of a requirement in its franchise obligating a street railway company to pave between its tracks, or adjacent thereto, where there is no general provision of statutory law imposing such an obligation, or authorizing its imposition by a municipality, the company can not be required to so pave or to pay the cost thereof. *Page & Jones Taxation by Assessment*, Section 60; *Joyce on Franchises*, Section 337; *Elliott on Roads and Streets*, Sections 987-990; *Booth on Street Railways*, 3d Ed., Sections 242-3; *Chicago v. Sheldon*, 9 Wallace, 50; *Western Paving Company v. R. R.*, 123 Ind., 525; *State, ex rel, v. Corrigan*, 85 Mo., 263; *Cleveland v. Electric Ry. Co.*, 1 N. P., 413 (reversed in 60 O. S., 536, on another point).

Where an obligation is imposed by a franchise upon a company to repair a street and maintain it in good order, it has been held by some courts that it would be afterwards subject to an ordinance of a city, requiring a pavement between its tracks, on the ground that the municipality is the judge of what constitutes the good order of the street. *City of Danville v. Danville Elec. Ry. Co.*, decided by the Supreme Court of Virginia, 76 S. E., 913.

But the general trend of authorities is that the mere obligation to repair, placed in a franchise, does not require the company, where the road has not been paved, to pave between or adjacent to its tracks or pay the cost thereof. *City of Philadelphia v. Hestonville, etc., R. R. Co.*, 177 Pa. St., 371; 46 L. R. A., 198, and notes; *Elliott on Roads and Streets*, Section 988 (3d Ed.), and authorities cited.

Under Section 3776 of the General Code of Ohio a municipality is authorized to require any part or all of the track between the rails of any street railway constructed within the corporate limits, to be paved with stone, gravel, boulders or wooden or asphaltic pavement. Whether this power can be exercised only through provisions of an ordinance granting a franchise to a street railway company or whether the city may afterwards, in a

1913.]

Railway v. Springfield.

case where the franchise is silent on the subject of paving or otherwise improving, impose the obligation to pay upon a street railway company, is a question which has not been settled or discussed by the courts of Ohio.

Assuming that where a franchise is silent this section authorizes the municipality to impose such an obligation upon a street railway company, the section has no bearing in this case where the franchise given by the board of county commissioners to the plaintiff is not silent on the subject of what care the railway company may take of the street but expressly stipulates what such care shall be.

Even if Section 3776 were applicable, it would apply only to the space between the rails of the plaintiff, whereas the city is undertaking to make the plaintiff pay the cost not only of paving between the rails but also the space eighteen inches on each side of the outer rails.

There is also in Section 3776 a curious omission, in that although manipulated and changed by the Legislature so as to include materials of different kinds, it has never yet included brick paving in said section. For these various reasons the court is clearly of the opinion that Section 3776 can not be availed of by the city of Springfield as giving a right to impose the cost of any part of the paving of said portion of the plaintiff's route upon the plaintiff.

It is claimed by the defendants in this case that by virtue of the terms of said ordinance of the city granting a franchise to the plaintiff the line was made on Limestone street as extending to the south corporation line and that this would by force of such terms include any part of the Clifton pike which, by extension of the corporate limits might become a part of Limestone street; in other words, that the term "south corporation line" is a flexible one, which would change with the change of the boundaries of the city. The court does not think this is tenable.

In the light of the authorities already cited the court is of the opinion that the plaintiff has a right to stand upon its franchise, granted by the board of county commissioners and is thereby exempted from paving between its tracks, or adjacent thereto or paying the cost of the same.

The petition asks not only for an injunction against the imposing of such paving or the cost thereof upon the plaintiff but also against the taking up of the tracks of the plaintiff and their re-location so as to enable the city to pave the portion of Limestone street in question according to its plans.

The court is of the opinion that the plaintiff can not prevent the city of Springfield from exercising the power to compel a street railway company to re-locate its tracks, as desired by the city, notwithstanding the provisions of the franchise of the county commissioners. This right of the city rests, in the opinion of the court, upon its police power. The tracks of a street railway ought to be so located as to best promote the convenience of those who travel with vehicles thereon and the owners of abutting property as well as to assure the highest degree of safety for all persons using the road. The city authorities are generally deemed the judges of what shall be required in this respect. Thus, in *Elliott on Roads and Streets*, Section 550, it is said that a regulation by a city requiring a railway company to change the location of its tracks in its streets for the public safety and convenience is a valid exercise of municipal power, citing as authority: *Atlanta, etc., Ry. Co. v. Cordele*, 128 Ga., 293 (57 S. E., 493).

The case of *Macon Consolidated Street Ry Co. v. The Mayor, etc., of the City of Macon*, decided by the Supreme Court of Georgia, reported in 38 N. E. Report., at page 60, is a very instructive one on this point.

The case of *Wabash Railroad Company v. The City of Defiance*, decided by the Supreme Court of the United States, and reported in 167 U. S., at page 87, is in principle much in point. This case was taken to the Supreme Court of the United States on error from the Supreme Court of the state of Ohio, the judgment of which as well as that of the subordinate courts was affirmed. The case was in reference to a requirement that new bridges be erected by a railroad company which claimed that it could not be required to do so because it involved the violation of its franchise. The court say that wherever a certain subject is within the police power of a city it can not by license or contract barter it away. Of course, the same restraint would be operative upon

1913.]

Railway v. Springfield.

a board of county commissioners as in the case of a municipality and the same principle would be applicable to all political subdivisions of the state.

The court is, therefore, of the opinion that the city of Springfield should not be enjoined from causing the plaintiff to relocate its tracks to meet the requirements of the improvement in contemplation.

The court is of the opinion that the controversy between the parties in this case should be determined as if it were a case in which the city of Springfield had given the franchise to the plaintiff in terms the same as that which it obtained from the board of county commissioners of Clark county and afterwards sought by the franchise pleaded in the answer of the city to virtually abrogate said first franchise and subject the plaintiff to such second franchise without its consent.

When the street is paved on that part of it described in the petition and in the manner described with brick, a question may then arise whether afterwards the plaintiff, under the obligation of its franchise from the board of county commissioners, may be required to keep the portion of the street between the rails and for eighteen inches on the outside of its outer rails in repair; that is, to keep it in the condition in which the city shall have left it by such paving. The opinion is expressed in *Elliott on Roads and Streets*, Section 988, that a street railroad under such circumstances would be bound to maintain the pavement thus constructed by the city and good authorities are cited in said work in support of the position thus taken. The settlement of that question is not necessary to the determination of this suit and the court, therefore, is of the opinion that "sufficient unto the day of evil is the knowledge thereof."

For the reasons stated the injunction asked for against the assessment of the cost of paving the said portion of said street in controversy is granted and the injunction asked for against the taking up and re-location of said tracks is refused.

PEDESTRIAN INJURED BY OBSTRUCTION ON SIDEWALK.

Superior Court of Cincinnati.

MARY RUCKER v. CITY OF CINCINNATI.

Decided, December, 1913.

Municipal Corporations—Not Liable for Obstruction on Sidewalk or Slippery Condition, When—Only Ordinary Care Required.

1. A municipal corporation is not liable for an injury caused by a fall upon a sidewalk rendered slippery by a deposit of mud and rock which were washed down upon it from an adjacent hillside during a heavy rain, where it appears that there was no opportunity after the cessation of the rain to remove the deposit.
2. The municipality is not required to go outside the line of the street and sidewalk, upon private property, and construct retaining walls or other devices for the purpose of preventing mud and rock from washing down upon the sidewalk. Its duty is to exercise reasonable care to keep the street and walk free from obstructions, which duty is performed when it is reasonably diligent in removing the obstruction after it comes into existence. And this is true even though a similar condition arises after each heavy rainfall.

Edward M. Ballard, for plaintiff.

John W. Weinig, Assistant City Solicitor, contra.

OPPENHEIMER, J.

Heard on motion to instruct verdict for defendant.

At the close of plaintiff's testimony, defendant made a motion to instruct a verdict in its favor. The testimony thus far presented tends to show the following facts:

On the night of May 16, 1912, at about 10:30 o'clock, plaintiff was injured by falling upon the sidewalk in front of the premises now known as 2540 West Sixth street. At this point Sixth street runs in a general easterly and westerly direction. On the north side of the street is a cement sidewalk about four feet in width. This walk lies practically at the foot of Price Hill, so that immediately adjoining the walk on the north is

1913.]

Rucker v. Cincinnati.

a rather steep slope about four feet in height, from the top of which the ground slopes gradually upward for a short distance to the foot of the long precipitous side of the hill. At the time of the mishap houses had been built on the north side of the street to the east and west of the place where plaintiff fell. In front of each of these houses, and immediately adjoining the sidewalk, were retaining walls erected by the property owners. But there was no such wall where the house numbered 2540 now stands, and probably there was no such wall for a distance of 150 or 200 feet at that point.

Whenever a heavy rain fell, sand, gravel, mud and silt were washed down from this slope onto the sidewalk at those places where there was no retaining wall, and a force of men from the street cleaning department would be sent shortly afterward to remove this deposit and clean up the walk. There does not seem to have been any such deposit at those points where retaining walls had been built.

On the evening when the mishap occurred rain started to fall quite early. It then ceased for a while, but later on it began again and rained very heavily while plaintiff and her two daughters were attending a motion-picture exhibit some distance away. When they left the play-house, however, the rain had stopped falling and it had cleared up. Plaintiff then determined to walk to her home, which was at 2787 West Sixth street. While passing by the place heretofore described, she stepped upon a rock which, it appears, was washed down from the hill, and she was thrown heavily to the sidewalk, breaking her left wrist in several places. The injury was quite serious and its effects will undoubtedly be permanent.

There is no evidence tending to show that plaintiff had ever previously passed the place where she was injured, or that she knew of the condition of the sidewalk which usually followed heavy rains. There is no evidence, to the best of our recollection, which bears upon the conditions as to light or darkness at the place of the mishap. We are therefore justified in assuming that plaintiff did not observe the deposit upon the walk until she came into actual contact with it, and that she

was herself guilty of no negligence. The sole question raised by this motion to direct a verdict for defendant is whether the city could be deemed negligent in what it did or omitted to do.

Section 5714 of the General Code gives to the municipal council the care, supervision and control of sidewalks and provides further, that council "shall cause them to be kept open, in repair and free from nuisance." It is to be remembered that the municipality is not required in the first instance to construct sidewalks, however desirable they may be. The failure to construct them can be construed only as a failure to exercise a public or governmental duty. But having once constructed a sidewalk and invited public travel upon it, a ministerial duty to keep it "open, in repair and free from nuisance" devolves upon a municipality; and for a failure to perform this duty a right of action enures in favor of any one who has suffered injury thereby. It is not contended that the sidewalk in the case at bar was not of itself in good repair. Indeed, it is admitted that it was in good condition; but it is contended that the superimposed dirt rendered it unsafe and defective, and that for this unsafe and defective condition, which was the proximate cause of plaintiff's injury, defendant is liable.

Now the duty which devolves upon a municipality is to keep the sidewalk open and free from nuisances or obstructions. But this duty is not absolute, and the mere presence of an obstruction will not render the city liable for an injury caused thereby. The city is not an insurer against the presence of all obstructions upon its sidewalks; but its liability is for negligence and for negligence only. The expression employed in the statute, that council shall cause the streets to be "kept open and free from nuisance" or obstruction, does not, in our opinion, mean that it must at all hazards keep any obstruction from coming upon the sidewalk, but only that it shall exercise reasonable care to remove any obstruction which may come thereon. The duty to exercise such care arises when the obstruction appears. What is reasonable care must of course depend upon the peculiar circumstances of each case. But the municipality must have had notice, actual or constructive, of the defect or obstruction and a reasonable time in which to remedy it.

1913.]

Rucker v. Cincinnati.

In the case at bar it is admitted that defendant had not a reasonable opportunity to remove the deposit from the walk; but plaintiff's counsel contends that as the dangerous condition was known to exist after each heavy rainfall, the city was bound to anticipate its existence and to provide against its recurrence by the erection of a retaining wall adjacent to the sidewalk or by the construction of some other device to carry off or prevent the accumulation of the deposit.

We can not follow plaintiff's counsel to this extremity. The duty for a negligent breach of which the municipality may be held in damages extended only to the streets and sidewalks. If these are maintained in a reasonably safe condition for use in the ordinary modes, the municipality will ordinarily have performed its whole duty. It can not be compelled to go outside the line of the traveled way and condemn private property and erect retaining walls or other structures thereon for the purpose of preventing obstructions from coming upon walks or rain water and dirt from washing over them. To require it to do so would be to impose upon a municipality a burden which it could never have been expected to assume, and to require it to provide against the existence of any dangerous condition which might possibly be anticipated.

Plaintiff's counsel cites and relies upon the case of *City of Toledo v. Center*, 16 C. C., 308, which in his opinion establishes the principle that the municipality is liable in damages for injury when, in the exercise of ordinary care, it should have been aware of the continued existence of conditions which were likely to cause a recurrence of a previous defect. In that case, however, plaintiff was injured by a fall upon a sidewalk which was actually defective. Some years before, the foundation of the walk had been washed out by the overflow from a catch basin. The walk had been repaired, but the conditions which caused the wash-out were permitted to continue, with the result that a second wash-out occurred some time before the mishap complained of. The court properly held that the jury was justified in presuming from the evidence that the city should have had notice of the second defect and should, in the exercise of

ordinary care, have repaired it. The case at bar is quite different.

We have arrived at our conclusion in this case with much reluctance. Plaintiff's injury, as has been said, undoubtedly is permanent and she has been practically incapacitated from earning a livelihood. Doubtless the community could stand the loss which has been suffered better than herself. But we have a duty to perform which can not be influenced by those feelings of sympathy which come over judges in common with other human beings. We might prefer to cast the unpleasant burden upon the jury and thus relieve ourselves of the responsibility which devolves upon us. But we confess that we do not know what we might say to the jury, if plaintiff's counsel is correct, except that defendant was negligent in failing to erect a retaining wall to the north of the sidewalk where the plaintiff fell—and this we do not believe to be the law.

Defendant's motion will therefore be granted.

1913.]

Souhrada v. David.

VALIDITY OF A BOND SIGNED IN BLANK.

Common Pleas Court of Cuyahoga County.

CHARLES W. SOUHRADA AND CHARLES WEINSTEIN V. EDWARD
DAVID, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF
MARY GARBARINI, DECEASED, AND ELIZABETH
GILBERT.

Decided, January, 1914.

*Sureties—Administrator's Bond Signed in Blank Enforcible—Tendency
of Modern Authority with Reference to Technical Defenses by
Sureties.*

1. One who signs in blank the printed form of an administrator's bond consents by implication that the blank spaces shall be filled in, and in the absence of fraud he is liable on the instrument so executed.
2. A claim of fraud, in securing the signature of the surety on an administrator's bond, can not be based on the ground that the bond was signed on the representation and in the belief that G was to be appointed administrator, when it appears that the application book in the probate court showed at the time the bond was signed and for sometime theretofore that it was the wife of G who was seeking appointment to administer the estate.

E. J. Hart, for plaintiff in error.

David & Heald, contra.

FORAN, J.

This case comes into this court on error to the municipal court. It was tried to the court below upon an agreed statement of facts, from which it appears that one Mary Garbarini died intestate October 9, 1904, leaving surviving her, as heirs at law, her husband and three children. The widower was known as James Gilbert, and the parties will be referred to herein under or as bearing that name.

Elizabeth Gilbert, a sister of James Gilbert, widower of the decedent, on October 27, 1904, filed her application for letters of administration, and on January 14, 1905, was appointed and qualified as administratrix of the estate of the decedent. The

plaintiffs in error, Weinstein and Souhrada, signed her bond as sureties December 31, 1904. The bond was in the usual printed form, and at the time it was signed spaces for the amount or penalty, date, name of decedent, and the names of the administratrix and sureties were blank or unfilled. The blanks, however, were filled in before or at the time the bond was approved and accepted by the probate court.

On December 30, 1908, Elizabeth Gilbert resigned, owing the estate \$606.42; and on January 18th, 1909, the defendant in error, Edward David, was appointed and qualified as administrator de bonis non of said estate, and brought this action to collect the amount due the estate. Judgment was rendered in his favor in the court below for the amount due, together with interest to the date of the judgment.

The plaintiffs in error, Weinstein and Souhrada, claim they are not liable, for the reason, first, that at the time they signed the bond the spaces for the name of the principal, Elizabeth Gilbert, and the name of the decedent were blank or unfilled; and secondly, because they signed the paper or the instrument at the instance of James Gilbert, the widower, who they claim, represented to them that he intended to be appointed administrator, and that therefore they never signed a bond for Elizabeth Gilbert.

Many authorities are cited by counsel for plaintiffs in error, divisible into two classes—those relating to the construction of what might be termed bonds complete in form when signed or executed, and those relating to bonds having unfilled blank spaces at the time of execution. With the first class, we are not here concerned, except in so far as they might throw light on the other phase of the question.

As a general rule, when a man obligates himself to become responsible for the faithful performance of the official duties of another, he does so as a matter of accommodation, and there is no other consideration for so doing except that presumed to arise from the solemnity of the act. It is for this reason that bonds of this character, when complete as to form, are always strictly construed. A man who, without consideration or pro-

1913.]

Souhrada v. David.

tection, becomes responsible for the debt or default of another, is given such protection by the law as can be given without manifest injury to others who are or may be innocent parties. The obligation upon which he is sought to be charged must be in writing, so that the precise terms of the obligation may be known and this writing will be strictly construed in his favor; and as a rule, oral testimony will not be permitted to alter, change or supply defects or omissions in the written instrument. This rule was rigidly enforced in *Hall v. Williamson*, 9 O. S., 17. The judgment for which Hall became responsible in this case was named in the bond as \$2,300, and plaintiff was not permitted to show that the judgment was, as a matter of fact, \$2,346.06; and not only because of the doctrine of strict construction, but perhaps for the reason, cognate thereto, that there might be another judgment against the principal for the precise amount of \$2,346.06.

Another striking instance of the application of the rule is *McGovney v. State*, 20 Ohio, 95. In this case Joseph L. Findley, the decedent testator, was named in the bond as James L. Findley. The surety, so far as the bond showed, became obligated to answer for the default of the executor of the estate of James L. Findley, and it was sought to extend the liability by implication beyond the strict terms of the bond or contract, and by parol testimony, upon the application of the rule *id certum est, quod certum potest*, but the court, remarking or speaking on the liability of sureties, says: "They are mere sureties, and as such may demand to be brought strictly within the terms of the obligation before they are charged."

These two cases fully exemplify the rule of strict construction as applied to bonds complete in form.

An examination of the authorities and adjudicated cases relating to the liability of persons signing blank bonds or instruments under seal clearly shows that the ancient rule or doctrine of the common law has, by reason of precedent and statute, undergone considerable modification. A bond signed in blank is really *carte blanche*, or a paper duly authenticated so far as signature is concerned, and given to another to be filled at the

latter's discretion, and thus giving authority with respect to some particular matter, without condition or qualification.

In *Cross & Bizzell v. State Bank*, 5 Ark., 531, the court says:

"The rule is well established that the signing of a blank paper confers upon the holder an unlimited letter of credit, and that an abuse of the confidence which it imports affords no remedy to the maker of it."

This was always the rule with respect to negotiable instruments. A distinction, however, has been ever insisted upon as between a negotiable instrument and a bond or deed. This distinction is based upon considerations that are not as cogent today as they were in ancient times. A promissory note, from its commercial character, imports consideration; and where it is signed in blank and passes into the hands of persons not privies, in the course of trade, business and commercial considerations demand that the signer be absolutely estopped from denying its validity for any reason. A bond is said to import consideration from the solemnity of its execution. By the old common law three things were essentially necessary to constitute a deed or bond—writing, sealing and delivery—and, when duly executed, the parties were concluded by its terms. This conclusiveness arose from the great deliberation and reflection which were said to accompany each successive step necessary to constitute it a final act. Under modern business, commercial and trade conditions, much of this supposed solemnity has wholly disappeared. The ancient wax impression seal gave way to the scrawl, scratch, or even blot seal, and finally disappeared altogether in this state, and perhaps in many others, so far as natural persons are concerned.

Is there any real or substantial reason why the *carte blanche* rule should not be applied to the ordinary bond signed in blank, other than that found in ancient rules and precedents, many of which have become obsolete because of the changed circumstances and conditions of modern social and business activities? Even the doctrine of the celebrated Dartmouth College case, the most famous case decided by the Supreme Court of the United States, had to be limited; and limitations placed upon the doctrine as

1913.]

Souhrada v. David.

expressed in the Charles river bridge case and the National turnpike case delivered the sovereign states of the Union from the grasp of monopolies. When a man signs an appeal or stay bond, for instance, he thrusts himself between a creditor and his debtor; he stops for a time the machinery of the law, which the creditor has invoked, and obligates himself to pay the debt if the debtor fails to do so or, having become insolvent, is unable to do so. When the debtor fails or is unable to pay, and suit is brought upon the bond, why should the surety be permitted, under the rule of strict construction, to avail himself of every possible technicality the ingenuity of counsel can devise? He knew what he was doing when he signed the bond, and must be presumed to have fully appreciated the possible consequences of his act; and if any one is to suffer, it ought not to be the person who was prevented from collecting a just debt by the voluntary act of the surety.

The doctrine of strict construction as applied to bonds in Ohio and other states is based upon an ancient rule found in *Perkins*, Section 118, which reads:

“If a common person seal an obligation, or any other deed, without any other writing in it, and deliver the same unto a stranger, man or woman, it is nothing worth, notwithstanding the stranger make it to be written, that he who sealed and delivered the same to him is bound unto him in 20 pounds.”

This rule is so old that the work, *Perkins on Contracts*, I believe, is not found in the law library now in daily use. The librarian informs me that it is probably packed away among other forgotten and obsolete authorities, at least it is no longer called for by members of the bar. This authority is cited in old English cases and in the early American cases in support of the doctrine of strict construction as applied to bonds incomplete in form. It became the settled law upon the subject, but its enforcement resulted in such evident injustice that the Legislature of Ohio, in March, 1883, passed an act abrogating the rule so far as filling in the amount or penalty of a bond after it is signed is concerned, provided the amount be filled in before or at the

time of the approval or acceptance of the bond. This act is known as Section 5 of the General Code. The obvious inference from the rule found in *Perkins*, Section 118, as above quoted, is that the bond "is nothing worth" if it contain no writing but the signature; and of course it followed naturally that, where a bond in the usual printed form having blank spaces for date and names and other minor details was signed before these blanks were filled, it was "nothing worth" as a bond. Courts, however, found that this view would work manifest injustice, injury and wrong, and finally settled upon the doctrine that only material blanks need be filled before signing.

The rule laid down in *State v. Boring*, 15 Ohio, 507, is that, "In the absence of a statute, a material part of an instrument under seal can not be added after execution, except in pursuance of authority under seal." That is, if one man signs a bond having unfilled blank spaces, and delivers it to another, these blanks, if they are material, can not be filled in by the holder, unless he has authority under seal to do so. As private seals are abolished in this state, a written authority to fill in the material blanks will be sufficient.

If we are to follow this rule, it becomes important to know what a material blank is. Material really means essential or necessary or important; but these words are no more illuminative than the word material. If the *carte blanche* rule is not to apply, and the hoary, moss-incrusted *Perkins* rule is to govern, it is easy to see that the amount or penalty is a material part of a bond. So, too, the name of the obligee, as held in *State v. Watson*, 4 O. D. (Reprint) 526; for if authority to fill the blank is denied, the bond without the name of the obligee would be payable to nobody, and no one would have a right to bring suit upon it. In the law of evidence we say a question is material if it has such relation to the matter in controversy that it may or ought to have some influence upon the determination of the cause being tried. So here it may be said that a material blank is one that has such relation to the bond and the parties thereto that the rights of the parties can not be determined if the blanks were not filled. In the bond under consideration, at the time

1913.]

Souhrada v. David.

Weinstein and Sauhrada signed it, the name of the obligee, the state of Ohio, appeared thereon; the amount or penalty, \$2,000, by force of the statute, Section 5, General Code, also appeared thereon, and the name of the obligor or principal, Elizabeth Gilbert, was written at the bottom thereof. The signatures of the sureties are written under her signature, and it will be presumed her signature was first thereon written, as the agreed statement of facts is silent as to this matter. The claim, however, is, that the bond is void because her name, that is, Elizabeth Gilbert as principal, and the name of the decedent, were not inserted in the body of the bond. Is this omission material?

In *State v. Boring*, *supra*, it was held that the date and the name of the obligor were not material. If the name of the obligor, or the party for whose default the sureties agree to be responsible, is not material, how can it be said that the name of the decedent, for the administration of whose estate the obligor is responsible, is material? The sureties agreed to answer for the default of the obligor, who is responsible and must answer for default in faithful administration of decedent's estate; and if the name of one is not material, neither is the name of the other. There can be no escape from this conclusion. Again, the administratrix is the obligor; they are one and the same person; and if the name of the obligor is not material to the validity of the bond, the name of the administratrix, who is identically the same person, can not be material. The trend of later decisions seems to be against relieving sureties on bonds because of technicalities or irregularities which are not vital and wholly destructive of the obligation itself. The names of sureties left blank in the body of an instrument, and no seal appearing to the signatures, was held insufficient to terminate liability of sureties in *Stevens v. Allmen*, 19 O. S., 485. See also *McLain v. Simmington*, 37 O. S., 484; *Partidge v. Jones*, 38 O. S., 375. Again, fewer seals than signatures appearing on a bond, it was held that parol evidence might be admitted to show that two or more of the signers adopted the same seal (45 O. S., 664). This was before private seals were abolished, and the seal was absolutely essential to the validity

of an instrument under seal, such as a bond. Where, by mistake, "administrator de bonis non" was inserted in the body of a bond instead of "administrator *de bonis non* with the will annexed," the surety was held liable. *Newburger v. Finney*, 17 C. C., 215.

A close analysis of all recent cases in Ohio and other states clearly indicates that the tendency of modern decisions is toward the adoption of the rule laid down in *Cyc* (text), Vol. V, 739, which is as follows:

"A bond takes effect by delivery; therefore, where one executes a bond and delivers the same to another, he will be bound thereby, and his liability will not be affected by the fact that there are blanks in the instrument, when executed, provided he executed it with knowledge thereof, and in the absence of fraud in filling up such blanks, since he consents by implication in such case that they may be so filled."

It is difficult to understand how fault can be found with this rule, and it will be applied in this case.

When plaintiffs in error, Weinstein and Souhrada, signed this instrument or bond, they knew there were blank spaces to be filled. The paper was before them. They could not possibly be ignorant of the fact that the blanks had not been filled in. They also knew, and could not help but know, that these blanks would be subsequently filled in. They were put upon inquiry as to the matters of which they now complain. They had a right, before they signed the bond, to insist that these blanks be filled in, or to demand a written stipulation as to how the blanks should be filled; but having freely and voluntarily signed and delivered it to some one, not named in the agreed statement of facts, they will be presumed to have impliedly consented to the blanks being filled in, as they subsequently were; and in the absence of fraud in so filling in these blank spaces, they must be held liable. They say, however, that they signed the bond at the instance of James Gilbert, who represented to them that he, James Gilbert, intended to be appointed administrator of the estate; but at the time of the alleged representations the application of Elizabeth Gilbert for letters of administration of this estate had been on

1913.]

Souhrada v. David.

file in the probate court for over two months, and her name was signed to the paper before they signed it. As the statute stood during this time, Elizabeth Gilbert was required to file her final account within eighteen months of the date of her appointment. She did not do so. She resigned December 30, 1908, four years after her appointment, without having filed such account; in fact she did not file a final account until she was compelled by order of the court to do so. During all this time these sureties remained passive and quiescent. They took no steps to protect themselves. They could have been released from this bond at any time after Elizabeth Gilbert qualified as administratrix. The statutes, Section 2604, Revised Statutes (General Code 10861, 2), afforded a full and ample protection in this respect. They did not see fit to avail themselves of the remedy the law provides for sureties whose confidence is or may be abused by their principals. Their duty to themselves and to the estate of the decedent required them to keep informed as to the due course of the administration of the estate, and, having failed to do so, they ought to be now estopped from complaining of a situation, largely if not wholly due to their own negligence and laches. In their answer they do not aver that there was any fraud practiced upon them, and the most that is claimed in the agreed statement of facts is, that James Gilbert represented to them, and they understood, that the said James Gilbert intended to be appointed administrator. If the representation was in fact made, it does not amount to a fraud upon them. In *Sterns v. People*, 102 Ill., 540, it appears that one signature to a bond was forged; and the other surety signed the bond believing the forged signature to be genuine; but it was held that this was no defense, and the surety who did sign was held liable, even though he signed under the belief that there was another surety on the bond. Certainly these facts tend strongly to raise a presumption of fraud, but the surety was held liable on the bond.

For the reasons indicated, the judgment of the municipal court will be affirmed.

REINSTATEMENT OF MEMBER OF A MUTUAL INSURANCE COMPANY.

Common Pleas Court of Hamilton County.

FRANCES E. BECKEL v. THE OHIO NATIONAL LIFE
INSURANCE COMPANY ET AL.

Decided, December, 1913.

Life Insurance—Conditions for Restoration of Members in Mutual Insurance Companies—Effect of Request of All Parties for an Instructed Verdict.

1. When in an action for money only all parties request an instructed verdict, such conduct is a submission of the entire cause, law and fact, to the court; and the court then may on request of all parties dismiss the jury and consider the cause on submission and its finding will take the place of the verdict of the jury.
2. In a mutual insurance company where the board of trustees has power to restore benefits to a member whose policy has been canceled by imposing conditions, and where the condition imposed is that, if such a member pass a successful medical examination—Now if such a member under orders from such a board both to him and the company's regular medical examiner pass such an examination in the opinion of that physician, and the report of such examination is sent to the board—that member is at once reinstated, and it is not necessary for any further action by that board in the absence of any direct stipulation to the contrary.
3. The general powers of an officer of a mutual insurance company will not give him the power to perform any act hostile to one or more of its members requiring discretion; and when such a company reserves the right to adopt either of two methods to replenish its mortuary fund such power is in its board of trustees and can not be delegated.

For statement see opinion.

G. F. Osler and Nelson & Hickenlooper, for plaintiff, offered:

Assessments must in fact be made by the proper power, but in addition every prerequisite to its validity must be complied with. *American Mutual Aid Society v. Helborn*, 85

1913.]

Beckel v. Insurance Co.

Ky., 1; Thomas v. Whallen, 31 Barb. (N. Y.), 172, 177; American Ins. Co. v. Schmidt, 19 Ia., 502; Pacific Mutual Ins. Co. v. Guse, 49 Mo., 329, 332.

Regularity must be affirmatively shown. No presumption of regularity. American Mutual Aid Society v. Helborn, 85 Ky., 1; Schea v. Masonic Benefit Assn., 160 Mass., 289, 293; Atlantic Mutual Ins. Co. v. Fitzpatrick, 2 Gray, 279, 281.

Assessments must be valid. If not, failure to pay is not a forfeiture. American Mutual Aid Society v. Helborn, 85 Ky., 1; Chicago Guarantee Fund Life Society v. Wilson, 91 Ill. App., 667-670.

Burden on defendant company to prove assessments valid. Murphy v. Mutual Reserve Fund Life Ass'n, 114 Fed., 404; Steward v. Grand Lodge, 100 Tenn., 267.

Assessments must be made by board of trustees and can not be delegated. Insurance Co. v. Chase, 56 N. H., 341-346; Dial v. Life Ass'n, 29 S. C., 560, 575 and 582; Phoenix Mutual Life Ins. Co. v. Bowersox, 6 O. C. C., 1.

A rule of law generally recognized is, that corporate power must be exercised through the board. 2 Thompson on Corporations, 2d Ed., Sections 1065, 1203, 1204 and 1205; Bradford Belting Co. v. Gibson, 68 Ohio St., 442; General Code of Ohio, Section 8660.

Waiver of forfeiture by course of dealing, by company. Security Life Indemnity Co. v. Underwood, 150 S. W., 293. Syllabus 3 and 4, items 3 and 4; Kenyon v. National Life, 57 New York Supp., 60; Jones v. Preferred Banker's Life (Mich.), 79 N. W., 204; and parts of the contract. policy and membership.

Bettinger, Guckenberger, Schmitt & Kreis, for defendant, offered:

An assessment will be presumed to be necessary. Crandall v. Farmers' Mutual Ins. Ass'n, 8 N. P. (Old Series), 632, bottom of page 635, 1st column.

Section 9428 of the General Code provides with respect to mutual associations such as this was that "such associations

by their regulations or by-laws may provide for: * * *

4. The duties and compensation of officers."

By-law No. 5 of the association provided as follows:

"They (the board of trustees) shall elect or appoint a general manager of the association and may enter into such contract as they may deem proper with such general manager whereby he shall undertake the management of, and generally manage and conduct, the public business and the office business of the association, in all its details and be responsible therefor."

Acting under this authority the board of trustees elected B. F. Coan general manager, and on March 15, 1892, entered into a contract with him to cover a period of fifteen years, and which at its expiration was renewed for a period of ten years and which provided among other things as follows:

"and his duties as such general manager are to generally manage and direct all the ordinary business of said association."

And further:

"He shall see that all rules and regulations governing the relations between the association and its members are faithfully carried out."

We submit that one of the ordinary matters of business of the association was to pay death losses out of the mortuary fund, and to keep up that fund from the proceeds of regular premiums and extra assessments. *Fee v. National Masonic Ass'n*, 110 Ia., 271, 275; *Dial v. Life Ass'n*, 29 S. C., 560.

* * * * *

We maintain that if the by-laws are held to be silent as to who should determine the success of the examination, this section with reference to original applications applies, so that before an applicant for reinstatement can be held to have passed a successful examination, he must have been recommended by the medical examiner and approved by the proper officer of the company, who, in the case at bar, was Mr. Coan, by virtue

1913.]

Beckel v. Insurance Co.

of his authority as president and general manager. *Graveson v. Cincinnati Life Association*, 8 C. C., 171.

DICKSON, J.

The plaintiff, a daughter of the insured and as his assignee, and also as administratrix of his estate, pleads performance of all conditions in a contract of insurance in a mutual life insurance company (the Ohio Mutual Life Association Co.), except proofs of death which were waived.

The defense made by the defendant, as the successor of that mutual company, is a forfeiture, because the intestate insured failed to pay certain extra mortuary calls and hence the risk was not in force at the time of the consolidation between the defendant company and the mutual company, viz., May 15, 1911.

To this new matter the plaintiff further pleads a denial of any forfeiture and further claims if there were, there was a restoration, a reinstatement—all in accord with the contract between the insurer and the insured, which contract was one of policy and membership combined.

At the conclusion of all the evidence each side requested an instructed verdict. Thus all questions were before the court. By consent the jury was discharged and in lieu of a verdict the further consideration of all points was, after arguments and briefs, duly submitted to the court.

It is admitted that the decedent did not pay two certain extra mortuary calls, and that he was notified that his policy had been canceled.

It is not disputed that after this notice he was neither treated nor considered as a member up to the time of his death, July 16, 1911.

We thus meet directly the validity of the reinstatement and the mortuary calls.

By-law 28, after stating what will work a forfeiture of membership, including a failure to pay mortuary calls, provides:

“But the board of trustees shall have power to provide for restoring benefits under such member’s certificate or certificates

by such forms and methods as may by the board be determined.
* * *

After the failure to pay those two calls the insured requested the board to restore his benefits under his contract and it by resolution answered:

"In the matter of the lapse of policy certificate of Mr. C. J. Norton, it was ordered that the policy remain canceled unless he pass a successful medical examination."

Thereafter within a reasonable time the insured and the company's medical examiner were notified of this action by the board and the insured was examined by this medical examiner who reported to the board in writing upon the insured's original application blank, as follows:

"Cincinnati, May 11, 1911.

"I have this day by direction of the Ohio Mutual Life Ins. Co. (the association's new name) examined Mr. Chas. J. Norton owing to his policy having been lapsed. I find him in good physical condition, his age taken into consideration.

"Signed. JNO. C. KUNZ,

"*Med. Examiner.*"

This report though it reached the company never reached the board, was kept from it by the president and general manager, who in person notified the insured that he would not be reinstated. The insured was an old man, had been a member for many years and the board knew his age.

It is clear from this report that he passed a successful examination.

The only question here is, was the report of the medical examiner self acting, or was it necessary for the board to act on it?

The board alone had the right to restore, reinstate. The insured had met its condition, had complied with its forms and methods. This board knew the case except expert medical knowledge. It as to this science had a right to rely upon its regular medical examiner, naturally friendly to the company and hostile to the insured, and let him perform the final act.

1913.]

Beckel v. Insurance Co.

Any attempted interference thereafter by any officer did not jeopardize the insured's rights.

The court is of the opinion that that medical report completed the restoration and it was not necessary for the board to formally act, because with the condition fulfilled the board itself could not have rescinded its own act.

If this holding be the law it is not necessary to pass upon the validity of the calls. But because there might be one who might hold that the board should have taken some formal action and this want be fatal, the court will consider the calls.

The insured's contract policy and membership combined, provided for the payment of quarterly premiums and also for extra mortuary calls when needed to provide for unexpected death losses. Early in 1911 it was necessary to make two extra mortuary calls. These are the calls the insured failed to pay.

To provide for unexpected death losses the insured's contract, Section 20, Amendment No. 2, By-laws, says:

"Provided that if the actual mortality experience of the association shall at any time exceed the expected rate, so that the mortuary fund shall be insufficient to meet the death losses, in every such case, the deficiency in the mortuary fund shall be made good by an extra mortuary call, or by an increase of regular call to the rate for the then age of the members as per annexed table."

We may assume in the absence of testimony to the contrary, that the necessities existed compelling causes for these extra calls. We naturally then ask who had the right and in whom thus was the duty to decide in each instance whether the mortuary fund should be made good by an extra mortuary call or by an increase of the regular call to the rate for the then age of the members. The president and general manager—one person here—exercised this discretion. Had he that right? Under the law (the by-laws of the insuring company) this officer's broadest powers were—

"and his duties as such general manager are to generally manage and direct all the ordinary business of said associa-

tion. * * * He shall see that all rules and regulations governing the relations between the association and its members are faithfully carried out."

In short, his duties were to see that all rules and regulations were faithfully carried out—thus an executive officer—and to generally in a general way manage and direct all the ordinary business of the company; *i. e.*, details, as an agent. Certainly the power to exercise discretion as to the fundamental rights of members was not in this officer, and could not be vested in an employee of any mutual company.

There was no power in any officer to pass upon that medical examiner's report and refuse reinstatement. The power to exercise a choice between two distinct methods of replenishing the mortuary fund is organic, fundamental, vital, and was not and could not be delegated to an employee.

The plaintiff was not qualified as the assignee, hence the judgment will be for her as the administratrix on her cross-petition for the amount prayed for.

1914.]

Plasko v. Carriage Co.

LEAD POISONING A "PERSONAL INJURY."

Superior Court of Cincinnati.

LOUIS PLASKO V. THE AMERICAN CARRIAGE COMPANY.

Decided, January, 1914.

Negligence—Employee Suffers From Lead Poisoning—Adequate Warning Required From Employer as to the Danger of Uncleaness—Personal Injuries Includes Occupational Diseases Under the Workmen's Compensation Act.

1. Where an employee is put to work with white lead or other material, under circumstances where his health may be endangered through failure to exercise the most unremitting care in removing from his clothing, hair and skin the minute particles of poisonous dust which are found in the atmosphere where such material is used, the law will not permit the employer to rest secure under the assumption that such employee will take such precautions but requires him to give such employee adequate warning of the danger.
2. The expression "personal injuries," as used in the workmen's compensation act of this state, includes occupational diseases contracted in the course of employment.

Murray Seasongood and R. S. Marr, for plaintiff.

Philip & S. C. Roettinger, contra.

PUGH, J.

The testimony in this case shows very clearly that the plaintiff, Louis Plasko, while in the employment of the defendant, the American Carriage Company, contracted the disease known as plumbism or lead-poisoning.

The plaintiff claimed that he contracted this disease through failure on his employer's part to give him proper warning and instruction as to keeping himself clean under the circumstances, and through failure to furnish him certain protective devices and a safe place in which to carry on his work. While the jury has found generally in favor of the plaintiff, there is reason to believe that the verdict is based principally, if not solely, upon testimony which showed, without contradiction, that no warning,

advice or instruction whatever was given the plaintiff when he was put to work with paint which contained white lead.

It is true, as claimed by the defendant, that it was not engaged in the manufacture of white lead, but was a carriage maker; also, that white lead, so far as the plaintiff was concerned, was used in its business only as an ingredient of the paint used on carriage wheels, and then only in small quantity; also that the plaintiff was only required to handle this paint occasionally, and in the ordinary course of his employment did not come in contact with it; also that the workmen were provided with water, towels, and a substitute for brushes, and had thus means of keeping themselves clean, at least to a certain extent, and also that no case of lead poisoning ever before occurred in this factory.

On the other hand, it is equally true that the defendant company furnished its workmen for use in their employment with a paint which was compounded upon the premises and contained white lead; also that the plaintiff contracted plumbism from handling this paint in the course of the work he was directed to do by his foreman; and that he was not warned of any danger connected with the work.

It was claimed by the defendant that the plaintiff represented he was experienced in handling paint of this kind, and had done this sort of work before, and that therefore it was not necessary to warn him of danger connected with the use of white lead paint. But the plaintiff denied all this. This issue was submitted to the jury, under an explicit instruction to the effect that if the plaintiff made the representations claimed, the defendant was thereby relieved of the duty, otherwise imposed upon it by the law, of giving him warning as to danger connected with the employment, and that the plaintiff, in such event, could not recover for any failure of the defendant in this respect. In this connection, the jury was also instructed the burden of proof was on the plaintiff to show that the white lead was used under such circumstances and in such quantity as to make the work dangerous; otherwise the plaintiff's claim in this respect failed.

1914.]

Plasko v. Carriage Co.

It is argued, with much stress, that there is no duty imposed upon an employer to warn his employee to keep himself clean, and that an employer should not be held responsible for want of cleanliness on the part of his workmen. Generally speaking this may be so, but where an employee is put to work with white lead or any other material, under circumstances where his health may be endangered through failure to exercise the most unremitting care in removing from his clothes, his hair and skin, and his whole person the minute particles of white lead dust that get into the atmosphere in which he works, and in scrubbing and washing out, every time he puts food or drink into his mouth, the extremely small bits of white lead that get under his finger-nails, the law will not permit the employer to rest secure under the assumption that the uninstructed employee will take these precautions. Under such circumstances, failure to warn an inexperienced workman of the risk is a neglect of duty for the consequences of which an employer must answer in damages.

Every point presented during the trial and during argument was dealt with in the charge to the jury, and the law bearing on the subject was explained at some length. There is no reason to suspect any prejudice, bias or sympathy on the part of the jury which returned the verdict and the court is not disposed to disturb the finding of the jury on the ground that it is against the weight of the evidence.

The defendant called witnesses to show that lead poisoning was unknown, or almost so, among carriage-makers, and that the business was not unsafe in respect of this disease. These witnesses were called as experts. Most, if not all of them, knew nothing whatever about this particular case. They were cross-examined as experts, and for the purpose of determining what they knew on the subject and how much study and attention they had given it, were asked a number of questions as to what they knew of certain governmental and other publications and certain legislation on the subject of plumbism as an occupational disease. Inasmuch as the questions were designed only to ascertain what these witnesses knew, and what study they had made of the subject concerning which they were called to advise

the court and jury, it was entirely immaterial whether the publications and legislation about which they were asked were issued and enacted before this action was brought or after. It is not true, as seems to be claimed, that such publications and subsequent legislation was introduced in evidence. The court is unable to see that any error prejudicial to the defendant was committed at trial in this respect.

Since the trial of this suit, the attention of the court has been called to what purports, and is no doubt a ruling of the State Employers' Liability Board wherein it is held that lead-poisoning, or indeed, any occupational disease is not a "personal injury" within the meaning of the workmen's compensation act. If this ruling is to be accepted as law, a new trial must be granted in this case, since the workmen's compensation act, with the increased liability it imposes on employers, was applied by the court in its charge to the jury for the purpose of determining the verdict.

Prima facie, the expression "personal injury," employed as it is in the statute without qualification, includes injury to health as well as such injuries as are caused by accident. In law, the term "personal injury" is used to differentiate injury to the human body from injury to property.

As a matter of fact, occupational diseases, such as lead-poisoning, anthrax, phosphorous poisoning and the like, are usually much more injurious to the sufferer than the pains, deformities and mutilations caused by accident. Every reason that lies at the foundation of a law protecting a workman from the consequences of accidents applies in most cases with double force in cases of occupational diseases. To limit the workmen's compensation act to cases where injuries result from accident requires that the word "accident" or "accidental" be read into the statute, and, under the usual rule of statutory construction, strong evidence of legislative intent to that effect should appear.

The ruling in question is based, in part, on certain decisions under the English workmen's compensation law; *Steel v. Camell. Laird & Co., Ltd.*, 7 W. C. C., 9, (1905), 2 K. B. 232; and *Fenton v. Thorley & Co.*, 5 W. C. C., 1, (1903), A. C., 443.

1914.]

Plasko v. Carriage Co.

The first comment to be made in reference to these decisions is that they apply to a statute which is materially different in the terms used in describing its purpose and object from the Ohio act. The English statute construed in these cases includes only such injuries as are accidental. The language of the statute is:

“Personal injury by accident arising out of and in the course of the employment.”

This of itself is enough to cause an Ohio court to hesitate in applying a construction of the English courts to the Ohio workmen's compensation act, and where it is added by way of further comment that the House of Lords in *Brintons, Ltd., v. Turvey*, (1905), A. C., 230, has held that anthrax contracted by a workman employed in sorting wool is an accidental injury, it is difficult to comprehend how the particular cases cited are of any weight as precedents. Anthrax is a disease caused by a germ or bacillus which, in the case cited, got into the eye of the sufferer and brought on an illness. Lead-poisoning is a disease caused by minute particles of white lead getting into the system and bringing on an illness. To say, under these circumstances, that anthrax is an injury arising from accident, while lead-poisoning is an injury arising from disease and not from accident, appears to the court to be a distinction too subtle for practical application.

The opinion of the Ohio board is based, also in part, upon the fact that, at the session of the General Assembly which enacted the workmen's compensation law which we are now considering, the Legislature provided, by statute, for an investigation and study of occupational diseases, obviously for the purpose of collecting data upon which to base legislation for the protection of workmen engaged in dangerous occupations, and probably for their compensation if disease were contracted. The enactment of this legislation does not suggest to the court that the Legislature recognized thereby that the existing workmen's compensation act did not cover occupational diseases. It seems more likely, under the circumstances, that it felt that further legislation on the subject might be desirable or necessary, and that,

possibly, something other than compensation in the form of a sum of money, might or should be provided for the sufferers.

The further objection that it is difficult or impossible to assign any particular date when any particular sufferer from an occupational disease contracted the same, does not appeal with much force to courts which have to pass upon similar questions not infrequently in cases of life and health insurance. Take the case at bar for an example: the testimony shows that, when he went to work for the defendant company, the plaintiff was in good health; that, in the course of his employment he handled paint compounded in part of white lead, and that in five months after he began work, he developed the characteristic symptoms of lead-poisoning.

It is with much hesitation and only after prolonged consideration that the court ventures to disagree with a finding of the state board on a subject with which it is much more conversant than the ordinary judge or lawyer. But each court must meet its own responsibilities as best it may, and when not controlled by a superior tribunal, must follow its own convictions. The considerations herein stated have led this court to the belief that the expression, "personal injuries" contained in the workmen's compensation act of this state includes occupational diseases contracted in the course of the employment, as well as those other injuries which, more strictly speaking, are described as "accidental."

For the reasons herein stated, the motion for a new trial will be overruled.

1914.]

State, ex rel, v. Construction Co.

AWARD OF CONTRACT FOR A BRIDGE SUPERSTRUCTURE.

Common Pleas Court of Muskingum County.

THE STATE OF OHIO, EX REL ROBERT E. EVANS, V. THE J. A.
SWINGLE CONTRACTING CO., THE BOARD OF COUNTY
COMMISSIONERS OF MUSKINGUM COUNTY, H. A.
BUERHAUS, AUDITOR, AND CHARLES A.
WALKER, TREASURER, OF MUS-
KINGUM COUNTY.*

Decided, September Term, 1913.

*Bridges—Procedure of County Commissioners in Awarding the Con-
tract for a Bridge Superstructure—Construction of Statutory Pro-
visions—Sections 2344, 2345 and 2350.*

1. A bidder for a bridge superstructure is not limited to a bridge of the exact length specified by the preliminary resolution of the county commissioners; and the principle of competitive bidding was not destroyed by the award of the contract, in the case under consideration, to a bidder whose plans provide for a bridge 4.8 feet shorter than the 751 foot structure called for in the preliminary resolution.
2. The functions of the joint committee, composed of the three county commissioners, the county auditor and the county surveyor, are properly exercised when consideration is given to the plans of all the bidders, including those whose plans differ from the one proposed in the preliminary resolution.

*Affirmed by the Court of Appeals in the following memorandum opinion, filed during the December (1913) term of that court:

"We have investigated the questions presented by counsel on the hearing of this case, and we have examined the several statutes to which our attention was specially called, in connection with the record of the county commissioners in respect to awarding said contract, together with the opinion of the court below which was submitted by counsel for the defendants as a part of their argument, and upon such investigation and examination we are of the opinion that the construction given said statutes and the conclusion reached by said court, and the reasons given therefor, are justified both by the law and the facts, and without going into details, we adopt the able and well considered opinion of said court as the opinion of this court, and judgment is therefore awarded the defendants for costs and the plaintiff's petition will be dismissed."

3. Failure to award a contract on the day the bids were opened does not deprive the commissioners of jurisdiction, but they may adjourn from day to day for further consideration of the plans submitted and for the hearing of engineers and experts thereon before making the award.
4. The discretion of a board of county commissioners must be regarded as fairly exercised, when it appears that the several plans and bids for the work in hand were carefully considered at several different meetings of the board and that outside expert advice was sought in addition to that of a competent county engineer.

R. J. King and S. J. Crew. for plaintiff.

Charles F. Ribble, Prosecuting Attorney, for commissioners.

E. R. Meyer, for contractor.

FRAZIER, J.

This cause was submitted to the court on the pleadings, the evidence, the arguments and briefs of counsel. By this action plaintiff seeks to enjoin performance of a contract, entered into between the defendant, the J. A. Swingle Contracting Co., and the board of county commissioners of Muskingum county, for the erection of the superstructure of a bridge at Sixth street, in the city of Zanesville, in place of one that was demolished by the March flood.

The contract for the proposed superstructure was entered into on the 3d day of September, 1913, and provides for a concrete structure with lift span over the canal. The grounds upon which plaintiff bases his claim for relief may be briefly summarized as follows:

1. That the board of county commissioners failed to comply with the statutes governing the procedure in the matter of bridge superstructures, in the following respects:

- (a) That the board of commissioners did not determine the length of the bridge, as required by Section 2344, General Code.

- (b) That the proposed superstructure does not correspond with the determination of the board of commissioners as to the required length of the bridge.

- (c) That the board of commissioners, as a board, never accepted the proposal of said J. A. Swingle Contracting Co. for the said superstructure.

1914.]

State, ex rel, v. Construction Co.

(d) That the board of commissioners did not award the contract at the time and place designated by the statute.

(e) That the board of commissioners considered no other bid but the bid of the said Swingle Contracting Co., and that the public was thereby deprived of the benefits of competitive bidding.

2. That the proposed structure is not of a suitable design or character.

Section 2344 provides as follows:

“When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall have single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion the commissioners may cause to be prepared plans, descriptions and specifications for such superstructure, which shall be kept on file in the auditor’s office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith.”

Section 2345 provides as follows:

“They shall also invite, receive and consider proposals on any other plan at the option of bidders, and shall require that all proposals on such plan shall be accompanied with plans and specifications showing the number of spans, the length of each, the nature, quality and size of the materials to be used, the strength of the structure when completed, and whether there is any patent on the proposed plan, or on any, and if any, on what part thereof.”

Under Section 2344, the board must determine the length and the width, etc., of the superstructure. A fair and just construction of the resolution of the board passed July 28, 1913, shows, in my opinion, that this was done. The resolution provided for the furnishing of material and labor for the reconstruction and rebuilding of the superstructure of the Sixth street bridge across the Muskingum river, in Zanesville, Ohio, to replace the bridge recently destroyed by the flood. It provided that the superstructure should consist either:

(a) Of four spans, each 150 feet in length, one span 76 feet long, and one lift span 75 feet long; or

(b) Of a series of reinforced concrete arches with supports from the same material, together with a lift span 75 feet long erected of the same material, on foundations to be provided by the county commissioners.

All bidders to submit plans under two separate plans as follows:

1. Said bridge to have a roadway 32 feet in the clear, to provide for a single street car track, and to have a sidewalk on each side 6 feet wide, said roadway to be provided with treated block floor, sidewalks to be concrete, said bridge to carry loads as specified for class A, city bridges in Cooper's latest specifications, 1909.

2. Bridge same dimensions as above except said roadway to be 40 feet in width in the clear, to provide for a double track, and sufficient strength to carry loads above specified.

This resolution clearly fixes the width of the bridge to be 32 feet in the clear, with a single street car track and sidewalks on each side 6 feet wide, and also provides for a bridge of the width of 40 feet in the clear, to be of the same dimensions as above provided. The phrase "dimensions above provided" had reference to the length of the bridge. There were to be four spans, each 150 feet in length, with one span 76 feet long and one lift span 75 feet long. These lengths added together make 751 feet. Applying the legal maxim, "*Id certum est quod certum redendum est*," the length of the bridge is determined to be 751 feet and the width to be either 32 feet with sidewalks, or 40 feet, at the option of the commissioners, when plans were submitted. In my judgment, Section 2345 does not require, when bidders submit their own plans, that they must be so worked out that the plan submitted will be of the exact length determined by the board in its resolution.

The argument is advanced in the briefs of plaintiff's counsel that, unless all plans be confined to the length so determined, then there can be no competitive bidding. The Legislature has wisely provided that bidders may offer their own plans, and that the board shall accept from the entire number submitted the plan it deems best, considering price, plan, material, and method of construction. Price is not the sole thing to be considered.

1914.]

State, ex rel, v. Construction Co.

Other elements enter in, viz., plan, material, and method of construction. A wide discretion is here given to the board of commissioners. A comparison of the plan selected with plaintiff's plan of bridge shows a difference of only 4.8 feet, when the clear length of the bridge is considered, excluding from both the length of the lift span, and both bids provide for exactly the same kind of lift span.

Section 2345 provides:

"When the bidder submits his own plan, it shall show the number of spans, the length of each, the nature, quality and size of the materials to be used, and the strength of the structure when completed."

This, it seems to me, plainly means that the bidder is not limited to the exact length of the bridge as determined by the board in its preliminary resolution.

Plaintiff complains that the board of commissioners never accepted the plan and proposal of said J. A. Swingle Contracting Co. This contention is based on the fact that when the joint committee, composed of the three members of the board of commissioners, the auditor and the county engineer, considered the plans submitted by the bidders, two of the commissioners voted against the acceptance of the Swingle plan and proposal. Section 2350 provides:

"If the plans, drawings * * * relate to the building of a bridge, they shall be submitted to the commissioners, county auditor, and county surveyor. If approved by a majority of them, a copy thereof shall be deposited with the county auditor and kept for the inspection of parties interested."

Acting as a joint board or committee under this section, on September 3, 1913, the auditor, Mr. Buerhaus, the county engineer, Mr. Strait, and Mr. Herdman of the board of commissioners, after due consideration of all the plans submitted (and they were numerous), voted to accept the plans of the Swingle Contracting Co. The other two commissioners, Mr. Cochran and Mr. Howell, voted against the acceptance. Section 2350 is mandatory, but it relates to plans, specifications, estimates, etc. It is claimed by counsel for plaintiff that the functions of this joint committee, composed of the auditor, the civil engineer,

and the board of commissioners, come into exercise only when the commissioners have definite plans, etc., prepared for all bidders in the first instance, and that this joint committee has nothing to do with plans, etc., submitted by the bidders. There is certainly a great deal more reason why bidder's plans, etc., are to be examined and approved by such joint board or committee than when preliminary plans are prepared for bidders; but even though the action of such joint board is unnecessary in the case of plans, etc., submitted by bidders, the records of the commissioners show that the board of commissioners, by its resolution of September 11th, approved the plan and accepted the proposal of and awarded the contract to the Swingle Contracting Co. The argument of counsel for the plaintiff carried to its logical conclusion would deprive the commissioners of the independent and salutary advice not only of the auditor and the county engineer but of the right to consult anybody as to such plans. So it merely comes to this: if the action of such joint board or committee is essential, such action was had; if not essential, then such action is a mere nullity and the final action of the board of commissioners must prevail.

The plaintiff further claims that the contract was not awarded at the time and place designated by the statute. Section 2346 provides as follows:

"In their advertisement the commissioners shall invite bidders to make proposals for furnishing all the materials and performing all the work, or for such parts thereof as bidders may deem proper, and state the time when and the place where bids will be opened and contract awarded. At such time and place or at a time to which they shall publicly adjourn the consideration thereof, they shall publicly open, read, and examine the proposals made, and award the contract for furnishing the material for the erection of such superstructure to the person or persons giving security as required by the provisions of this chapter who is the lowest or best bidder or bidders, considering price, plan, material and method of construction."

No complaint is made of the advertisement or of its sufficiency. The advertisement provided that bids should be submitted on August 26, 1913. A large number of bidders submitted plans with bids. On the 26th day of August, the day when according

1914.]

State, ex rel, v. Construction Co.

to the advertisement bids were to be opened, bids were opened, and the journal of the commissioners shows the following resolution:

“R. C. Cochran moved and E. V. Howell seconded the motion that as Professor C. E. Sherman has designated Professor C. T. Morris to represent him in regard to the Sixth street bridge, the foregoing proposals be referred to Professor C. T. Morris for consideration. The roll being called on this motion resulted as follows: Cochran yea, Herdman yea, Howell yea; motion carried.”

The journal shows that the commissioners thereafter adjourned from day to day until September 3d. At this time, they had the report of their expert, Prof. C. T. Morris, on the various plans that were submitted by the bidders. The report furnished the commissioners by engineer Morris in substance states, that careful estimates have been made of the cost of the various plans, that all the bids were carefully compared and considered, and that the two lowest bids were those of Daniel B. Luten, but the report says:

“The Luten plans are in some respect indefinite and would have to be supplemented by detail drawings. The objection to the Luten bids lie in the specifications, which are not complete.

“The next lowest bid is that of R. H. Evans & Co. upon plan prepared by Edwin Thatcher. These plans need supplementing with additional detail drawings. The specifications, however, are clear and complete in every respect, except that they also specify the city of Zanesville specifications for wood block pavement. This design has one more pier in the river than the other plan, but this disadvantage is to some extent offset by the greater area of clear water way.

“The next bid, that of the J. A. Swingle Contracting Co. (the bid accepted by the commissioners), has an excellent plan, and while it does not provide quite as much area of water way, it has longer spans and therefore fewer piers in the river. These plans and specifications are well made and satisfactory in every respect.”

He further says that the plan and price submitted by the Fritz, Roomer, Cooke. Grant Co. is so high that consideration of the plan could not be recommended; that the plans of Mr. Scully are well gotten up, and if a steel bridge is desired, would no doubt meet the requirements of the location.

The joint board or committee, composed of the commissioners, the auditor, and the county engineer, proceeded to canvass the various plans and to ballot on them, with the result that the joint board adopted the Swingle plan, but the contract was not awarded on that day. According to their journal, the board adjourned to the next day, September 4th, when the journal shows the following:

“In the matter of the Sixth street bridge superstructure, the board considered the plans and specifications adopted for the superstructure of the Sixth street bridge, but not being prepared to vote on the awarding of the contract, postponed the matter until the following day, September 5, 1913.”

The journal of the commissioners then shows that the commissioners met and adjourned each day thereafter, except Sundays, and on the 11th day of September, the board, by a formal resolution, accepted the proposal of and entered into a contract with the Swingle Contracting Co.

The claim of plaintiff's counsel is that, inasmuch as the record does not show that on the 26th day of August, when the bids were opened, an adjournment was made to a specific future date, the board thereby lost jurisdiction to further entertain the proceeding as to said superstructure. It is true that the contract was not awarded on the 26th day of August, the day the bids were opened. The statute, however, is to be given a reasonable construction and to be construed in connection with Section 2355, which provides:

“If they [the commissioners] fail to make a contract, as herein provided, on the day named in the notice, the commissioners may continue from day to day until it is made.”

Even in the absence of such a statute as Section 2355, it is difficult to see what harm or prejudice could in any way come to anybody by the procedure followed by the board. The board could not definitely know how long their expert, Mr. Morris, would be engaged in considering the various plans and making his report to them. All bids had been publicly opened and read and the whole turned over to a competent engineer for his analysis and report. The plaintiff himself was a bidder and, so far as the record shows, he made no protest to this procedure

1914.]

State, ex rel, v. Construction Co.

and made no demand in that behalf. I am of the opinion that by its method of procedure the board did not lose jurisdiction of the right to award a contract and that the board had the legal right to award a contract when it assumed so to do.

It is claimed by the counsel for the plaintiff that Section 2355 does not apply when bids are submitted by bidders as provided in Section 2345. By reason of chopping the original law into sections for our Revised Statutes, the matter has become somewhat confused. Section 799, found in Vol. 85 O. L., p. 221, reads as follows:

“It is competent for the commissioners, if they fail to make the contract or contracts as herein provided for, on the day named in the notice, to continue from day to day until such contract or contracts be made.”

The previous paragraphs show that the Legislature had in mind both kinds of contracts, not only those awarded upon plans submitted by the commissioners, but likewise where plans were submitted by the bidders, and the law as originally passed is much clearer on this point than it is in our General Code.

It is further contended by the plaintiff that the board considered only one plan and that, therefore, the right to competitive bidding was thereby defeated. This contention is not sustained by the proofs. The evidence shows that the plans, bids and estimates, were submitted to a competent engineer for his inspection and report. The engineer so selected was recommended by Prof. Sherman of the State University, one of the most competent engineers in the country. Mr. Morris, the engineer selected by him, furnished the commissioners a carefully wrought out, detailed report, showing a comparison of the different plans submitted and their respective values. Of the plan finally selected (that of the J. A. Swingle Contracting Co.), he says in his report:

“The plan and specifications are well made and satisfactory in every respect.”

The record shows that Mr. Strait, our own county engineer (skilled in his profession), finally approved the plan proposed by the Swingle Contracting Co., which plan the board finally adopted. The plan of bridge submitted by the plaintiff was

given careful consideration. The report of the engineer above referred to shows this. Mr. Morris' report on the various plans submitted was before the board and received careful consideration. The resolution awarding the contract is conclusive as to this, and states:

"Whereas, in pursuance to the advertisement inviting proposals for furnishing of materials and performing of work for the building of a superstructure for the Sixth street bridge, in Zanesville, Ohio, certain plans, specifications, drawings, bills of material, and estimates were submitted by various contractors to the commissioners, together with bids and proposals for building the same." * * *

The plaintiff claims further that the proposed plan and design accepted by the commissioners is not a suitable one for the place at which it is to be erected. It is not the office of the court to devise plans for public structures. This subject is relegated to various officers and boards, and such officers and boards must exercise their judgment and discretion and determine the plan. It is a principle of law that the courts will never intervene where a discretion to be exercised is reposed in another, unless it is shown that there is a gross abuse of such discretion. It may be that no two boards of commissioners would agree as to which of the plans submitted is the better, all things considered, but it certainly does appear here that in this instance the board proceeded carefully, took competent and independent advice from an unbiased engineer, and likewise had the benefit of the counsel of Mr. Strait, the county engineer. Under all the evidence, the discretion of the board seems to have been fairly and reasonably exercised, and their judgment was finally recorded in their resolution, awarding the contract to the Swingle Contracting Co. Under the evidence here submitted, there is not the slightest suspicion or indication of any favoritism or untoward dealing in this matter. Every bidder had his day in court, and his plan, bid, and method of construction were carefully considered.

For these reasons, the finding of the court is in favor of the defendants and the petition will be ordered dismissed at the plaintiff's costs. Notice of appeal and bond in appeal \$500.

1914.]

Greve v. Traction Co.

**QUESTIONS GROWING OUT OF COLLISION OF STREET
CAR WITH VEHICLE.**

Common Pleas Court of Hamilton County.

FRANK GREVE V. THE CINCINNATI TRACTION COMPANY.

Decided, December 30, 1913.

*Negligence—Status Where Last Chance is Not Alleged But May Have
Been Raised by the Evidence—Trial of a Cause in Absence of the
Pleadings—Discretion in Permitting an Amended Reply to be Filed
—Charge of Court—Verdict Treated as Excessive in View of
Weight of the Evidence.*

1. Failure to read the pleadings to the jury or to send the originals or copies thereof to their room when they retired for deliberation, does not constitute error where the issues were correctly stated in the charge of the court.
2. It is within the sound discretion of the court to permit an amended reply to be filed at any stage of the proceedings, and where such reply merely traversed averments of the answer setting up contributory negligence the claim can not be made that the defendant was taken by surprise.
3. In an action against a traction company, for damages on account of the striking by one of the defendant's cars of the vehicle which the defendant was driving, it is not error on cross-examination of the motorman to permit him to testify as to the equipment of his car and the kind of brake employed thereon.
4. Notwithstanding the inference from a statement in the Brandon case, 87 Ohio State, 187, that the doctrine of last chance may be made applicable to a case by the evidence, it is nevertheless probably error to charge on the subject of last chance, where it is not made applicable by any allegation of the petition and there is nothing to indicate that he was in a place of danger except that he was crossing the track of a street railway.
5. A verdict of \$7,000 for permanent injuries to a driver fifty-one years of age is excessive, where the injuries do not unfit him for the work he has been accustomed to perform, and the testimony is of such a character as to present a close question as to the liability of the defendant.

Kittredge & Wilby and R. E. Simmonds. for the motion.

*Harry H. Friedman, Jacob S. Hermann and Thos. L. Michie,
contra.*

GORMAN, J.

This is an action brought by Frank Greve to recover damages from the defendant by reason of the alleged negligence of the motorman of the defendant company, which resulted in a collision between a car of the defendant company and a carriage which was being driven by the plaintiff on West Eighth street, in the city of Cincinnati, on or about the 11th day of May, 1911, near the corner of Eighth and Linn streets. The negligence charged to the defendant's motorman was that he negligently, carelessly and with great violence struck the carriage which the plaintiff was driving, and that the motorman negligently failed to slacken the speed of the car of the defendant company upon observing that plaintiff was crossing the said Eighth street and negligently and carelessly failed to stop said car to avoid striking said carriage.

The defendant in its answer admitted that it was a corporation under the laws of Ohio at the time alleged in the petition and was engaged in operating a line of street railway over Eighth street, in said city of Cincinnati, at the time and place alleged by the plaintiff, but denies each and every other allegation of the petition, and by way of second defense it set up that the plaintiff was injured, first, by reason of his own negligence, and secondly, by reason of negligence which contributed to his own injury.

After the jury were qualified and sworn and the case was about to proceed to trial the plaintiff asked and obtained leave to file an amended reply denying contributory negligence on his part.

Upon the trial of the case and the submission of the same to the jury a verdict was returned in favor of the plaintiff for \$7,000.

A motion is now interposed by the defendant to set aside the verdict on several grounds, which will be noted during the course of this decision.

This was the second trial of this case. It was first tried before Judge Cushing, and on the conclusion of the plaintiff's testimony he arrested the case from the jury and directed a verdict to be returned in favor of the defendant. The plaintiff

1914.]

Greve v. Traction Co.

prosecuted error to this judgment, and the court of appeals reversed the same, holding that the evidence of plaintiff disclosed a case which should have been submitted to the jury. The defendant thereupon prosecuted error to the Supreme Court, and the case is now pending in that court upon the petition in error of the defendant to reverse the judgment of the court of appeals. After the petition in error and all the pleadings in the case were filed with the Clerk of the Supreme Court and while the cause was there pending, plaintiff appeared before the common pleas court, procured a setting of the case and the case was heard the second time before this individual member of the court.

At the outset counsel for the defendant objected to proceeding to trial in the absence of the original pleadings, the plaintiff having failed to produce the same in court when the case was about to proceed to trial. Counsel for the plaintiff contended that in view of the fact that the case had been taken on error to the Supreme Court by the defendant and the papers there filed, the plaintiff was unable to produce the papers in the court of common pleas, and requested that a printed copy of the record which was filed in the Supreme Court be used and also that copies of the original pleadings be used.

Counsel for the defendant also objected to the leave granted by the court to the plaintiff to file an amended reply at the time leave was given when the case was about to be presented to the jury.

There are numerous grounds of error alleged to have occurred during the trial of the case, and upon one or all of these grounds counsel for the defendant contend that a new trial should be granted. The court will notice these alleged grounds of error in the order in which they are set out in the brief of the defendant filed herein.

First it is objected that it was prejudicial error to proceed to the trial of the case in the absence of the original pleadings.

The court is of the opinion that in view of the fact that copies were used, and also the printed record setting out in full the original pleadings, and also in view of the further fact that the court in charging the jury read from the printed record the

pleadings and further stated to the jury what the court conceived to be the issues in the case, the defendant was not prejudiced by the absence of the original pleadings. The court is of the opinion that if the issues were correctly stated without reading the pleadings or without sending any copies into the jury room with the jury, there would be no error in the failure either to read the pleadings or to send copies or originals into the jury room when they retired for deliberation.

The court is of the opinion, however, that counsel for the plaintiff might very well have produced the original pleadings if they had been diligent, and that there would have been no difficulty in requesting the clerk of the Supreme Court to return the original pleadings temporarily to the files of the court of common pleas, and it may be further said in this connection that counsel for plaintiff were notified by this court that this might have been done in ample time to have avoided this objection on the part of the defendant; but counsel for plaintiff appears to have been willing to take the chance of any error which might result from their failure to produce the pleadings and to throw the burden upon the trial court of holding that there was no error in counsel's own neglect.

As to leave being given to file an amended reply at the time it was given, the court is of the opinion that there was no error prejudicial to the defendant in so ruling. We believe it is within the sound discretion of the court to permit a reply to be filed at any stage of the proceedings, in order that substantial justice may be done and that the parties may not be deprived of a substantial right by reason of any neglect or omission on the part of their counsel, provided no prejudice resulted to the adverse party. The amended reply simply traversed the averments of the answer setting up contributory negligence. Now, when the defendant set up the plea of contributory negligence it must have been prepared to establish and prove contributory negligence on the part of the plaintiff. The fact that the plaintiff, up to the time of trial, had not denied contributory negligence is not sufficient, in the opinion of the court, to warrant counsel for the defendant in claiming that they were prejudiced by the failure to traverse the averments of contributory negli-

1914.]

Greve v. Traction Co.

gence, nor could they claim to have been taken by surprise. The court is of the opinion, therefore, that there was no error in granting leave to file this amended reply.

It is next contended that there was error on the part of the court in admitting evidence tending to show the kind of a brake that was used on the car which came into collision with the plaintiff.

The question of the kind of brake upon the car arose incidentally, when the motorman who was operating this car in question was placed upon the stand by the defendant and was interrogated as to the manner of stopping his car, the time and space within which the car could have been stopped and the appliances which the motorman could use to stop his car. All these matters, the court is of the opinion, were proper to consider in determining whether or not the motorman exercised reasonable care in the operation of his car, in his effort to stop the car or slacken its speed, so as to avoid injury to the plaintiff; if such things were necessary to be done. Furthermore, these matters were brought out in cross-examination of the defendant's witness and very much greater latitude is allowed on a cross-examination of a hostile witness and one in the employ of the defendant than would be allowed if the plaintiff undertook to show affirmatively the equipment upon this car.

The court is therefore of the opinion that there was no error in permitting Adkins, the defendant's motorman, to testify as to the equipment upon his car and the kind of a brake employed thereon.

The next ground of error alleged is that the court erred in its charge to the jury in several particulars.

As a part of the charge to the jury the court said, among other things:

"If the defendant's motorman was negligent, and the plaintiff was also negligent, yet unless the plaintiff notwithstanding his own negligence, might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover a verdict in this case: but if, by the exercise of ordinary care, he might have avoided the consequences of the defendant's negligence, if the defendant was negligent, he would not be entitled to recover, as, under such circumstances,

the plaintiff was the author of his own injuries and was guilty of contributory negligence, which would prevent him from recovering a verdict in this case."

If this be a correct statement of the law, it can only apply, in the opinion of the court, to a state of facts which raise the question of the last chance, and this language employed by the court in this case is a modification of the rule laid down in the case of *Davies v. Mann*, 10 M. & W. A careful examination of the pleadings will disclose that the plaintiff did not undertake specifically to set out a last chance case. It is true that in his petition the plaintiff alleged that the motorman operating said car carelessly and negligently failed to slacken the speed of said car upon observing that plaintiff was crossing the said street, and negligently and carelessly failed to stop said car to avoid striking said carriage. The plaintiff failed to allege that he was in a position of danger known to the motorman of the defendant's car and from which position he could not extricate himself at the time he was struck by the defendant's car. It may be that the pleading leaves to inference the fact that the plaintiff was in a position of danger at the time the motorman observed him crossing the track of the defendant company, but it does not necessarily follow that the track of a street railway company is a place of danger, and the court is of the opinion that while this language does correctly state the law relating to the last chance, nevertheless it was error on the part of the court to incorporate this language into the charge in the case at bar.

Furthermore, the court, among other things, charged the jury as follows:

"In this case, if you find from the evidence that the plaintiff acted as an ordinarily prudent person under the circumstances and his conduct was not negligence in attempting to cross the track of the defendant company at the time and place he did, and if you further find that the injuries of the plaintiff were the direct result of the negligent act of the motorman in running his car at a high and excessive rate of speed without slackening the same or attempting to avoid injuring the plaintiff, and you further find that the plaintiff was not guilty of such contributory negligence as helped to produce his own injuries, then

1914.]

Greve v. Traction Co.

under such circumstances plaintiff's injuries were the direct result of the defendant's negligence and the plaintiff would be entitled to recover a verdict at your hands."

It is claimed by counsel for the defendant that there was error in this part of the charge and in counsel's brief a part of this language is quoted and made the basis of the claim of error.

There is no doubt that if the court employed only the language quoted by counsel for defendant, it would be prejudicial error, but the whole statement taken together, in the opinion of the court, does fairly state the law and can not be fairly said to be erroneous.

There are many other errors claimed to have been committed by the court in the charge, some of which claims the court is of the opinion are well founded and that the language employed constituted error; but whether or not they would be prejudicial, taking the charge as a whole, the court is not prepared to say, but is inclined to believe that they were not prejudicial if taken in connection with the whole charge.

It is further claimed that the verdict of the jury is excessive and that \$7,000 for injuries to a man fifty-nine years of age, of the character shown by the evidence to have been sustained by the plaintiff, indicates that the jury must have been influenced by prejudice or passion, or they must have indulged in speculation and guessing as to the amount of the recovery to which the plaintiff was entitled, if he was entitled to recover at all.

The court is of the opinion that the amount of the verdict is excessive under the evidence. It is true that the plaintiff was probably permanently injured, but the injury was not of such a serious nature as to incapacitate him from the performance of labor of the character he had been accustomed to perform before. The court is further of the opinion that counsel for the defendant was somewhat at fault in submitting this case to the jury without argument, and the jury may thereby have inferred that counsel for the defendant had no faith in the defense of the company and may therefore have assumed that counsel for the defendant was, by his failure to argue the case, conceding liability on the part of the company. However this may be, the

court is of the opinion that at best it was a very close question as to whether or not the defendant company was liable. The situation presented at the time the plaintiff was injured was such that the jury might very well have returned a verdict in favor of the defendant. It was broad daylight, in the middle of the day, no vehicles except the car in question running eastwardly on Eighth street, and the plaintiff driving a carriage, seated upon the top or box, with a clear view westwardly, crossing the track in front of this car at a distance variously estimated at from one hundred and fifty to twenty-five feet. It was the duty of the plaintiff to be on the lookout and he could and did see this car approaching. It was but a matter of a fraction of a minute to have waited until this car passed him before attempting to cross the track in front of the car. It was easier for the plaintiff to have stopped his carriage than it was to have stopped the street car. It is very doubtful whether or not this verdict ought to stand upon the weight of the evidence.

The court is clearly of the opinion that the amount of the verdict is excessive. The court is further of the opinion that a prejudicial error was committed in the charge to the jury, which the court believes was only applicable to a case of last chance.

In view of the many doubts in the mind of the court with reference to the facts of this case, the trial of the same while the cause was still pending in the Supreme Court, the going to trial without the original pleadings, when the same could have been procured, the error of the court in the charge to the jury, the amount of the verdict, and the doubt as to whether or not the verdict is not manifestly against the weight of the evidence, the court is of the opinion that substantial justice requires this verdict to be set aside and a new trial granted.

I have come to this conclusion reluctantly because this is the second trial of this case, and because the court is loath to set aside the verdict of a jury upon the weight of the evidence, if it is possible to sustain it at all upon that ground; but where the court is of the opinion that his charge may have misled the jury and probably did mislead the jury; to the prejudice of the defendant, the court should not hesitate to set aside the verdict and grant a new trial.

1914.]

Roberts v. Columbus.

It is probable that the court fell into the error in charging upon the question of last chance by reason of what was said by Judge Spear in the case of *Traction Company v. Brandon*, 87 Ohio State, 187, where, on page 196, he employs this language:

“But, assuming that Brandon was guilty of some negligence in driving upon the track, yet if the motorman, in the exercise of even ordinary care, after he saw the horse and appreciated Brandon’s peril, had time and opportunity to avoid the possible consequences by checking the car, and neglected to so exercise such care, such neglect would be negligence, and might properly be regarded as the proximate cause of the injury.”

Now the record in the case just cited does not specifically set up the last chance situation. Nevertheless the Supreme Court appears to think, as indicated by Judge Spear’s language just quoted, that if the facts show a case of the last chance it might not be error upon the part of the court to charge the jury upon this proposition of law.

However this may be, the court is of the opinion that a more satisfactory result can be obtained by a new trial in this case.

For the reasons stated, the verdict will be set aside and the motion for a new trial granted.

THE AWARDED OF PUBLIC CONTRACTS.

Common Pleas Court of Franklin County.

ROBERTS V. CITY OF COLUMBUS ET AL.

Decided, January 7, 1913.

Official Discretion—Will Not be Interfered with by the Courts, Unless—Split Contracts—Hax-Payer’s Suit to Enjoin an Award.

1. To entitle a plaintiff to a temporary injunction it must appear that the facts stated in the petition are such as to entitle him to a permanent injunction, provided the facts pleaded are established by the evidence to be subsequently submitted.
2. Official discretion will be interfered with by the courts only where it is apparent that the official clothed with such discretionary power has so acted that his action amounts to a fraud upon the public whom he serves.

3. A tax-payer who is evidently only a figure-head for an unsuccessful bidder will not be heard to complain, where he rests his claim for relief upon the fact that the officer awarding the contract exceeded his authority in splitting it up among four persons against only one of whom is relief sought.

M. E. Thrailkill and *J. D. Karns*, for plaintiff.

Stuart R. Bolin, City Solicitor, contra.

BIGGER, J.

The case is submitted on an application of the plaintiff for a temporary injunction. The action is brought by the plaintiff in his capacity as a tax-payer to restrain the city and its officials, and the Eureka Fire Hose Manufacturing Company, from carrying out the terms of a contract entered into for the purchase of fire hose.

On the hearing quite a mass of testimony was taken, and the case has been argued at length by counsel, both upon the law and the facts. To entitle the plaintiff to the relief here asked—a temporary injunction—it must appear that upon the facts stated in the petition he will be entitled to the ultimate relief of a permanent injunction, provided the facts pleaded be established by the proof.

A great deal of testimony was taken upon the hearing as to the relative merits of the different kinds of hose which were bid upon, as reflecting upon the plaintiff's claim that the carrying out of this contract will be a misapplication and misuse of the funds of the city. It is a well established rule of law that courts will not interfere with the actions of municipal officers clothed with a discretion in making contracts for a municipality, unless they amount to fraud or gross abuse of the discretion reposed in them by law. If the courts were to sit to hear and determine whether or not municipal officers, who are clothed by law with certain discretionary powers, had exercised them to the highest advantage of the city just as the officers themselves consider and determine these questions, the courts would have time for little else, and we would have government of municipalities by the courts, instead of by the officials of the municipalities. That would be to substitute the court's judgment

1914.]

Roberts v. Columbus.

and discretion for the discretion which the law reposes in the city officials.

The rule is, therefore, well established that it is only where it is apparent that the official who is clothed with a discretionary power has grossly abused it, and has so acted that his act amounts to a fraud upon the municipality, that the court will interfere to restrain the exercise of such discretionary power.

After a careful consideration of the evidence touching the quality of the hose contracted for with the Eureka Fire Hose Manufacturing Company, I am satisfied that there was no such abuse of discretion on the part of the director of public safety as would warrant this court in interfering, if the director had purchased the entire amount of hose from the Eureka Fire Hose Manufacturing Company. Even to a non-expert, the quality of this hose is manifestly superior to that of any other hose bid upon. Its advantages over the other hose which was offered in competition with it is clearly apparent. The officers of the fire department of the city all unite in saying that it is far superior to any other hose upon the market, and the testimony is overwhelming that its life far exceeds that of the other brands of hose, while at the same time affording greater security to life and property while it is in use. I am satisfied from the evidence that its life is practically twice that of the cheaper grades of hose. So far, therefore, from the evidence showing that an acceptance of the bid of the Eureka Fire Hose Company was an abuse of the discretion reposed in the director of public safety, I am of opinion the purchase of this hose, having regard to the relative merits of the different qualities of hose bid upon, was a wise and prudent exercise of the discretion reposed in him. The director was not required under law to purchase from the lowest bidder. To do so might be, and often would be, very bad business policy. Clearly, therefore, had the director entered into contract with the defendant, the Eureka Fire Hose Manufacturing Company, for the entire amount of hose which he was directed to purchase, he could not be charged with any abuse of the discretion reposed in him.

As I understand, counsel for the plaintiff, however, are not contending for this, but rest their claims to the relief sought

solely upon the ground that the director of public safety exceeded his authority when he split the contract instead of awarding it all in one contract. This, it is urged, would destroy competition, and would be subversive and destructive of the principle involved in competitive bidding.

As I view it, the plaintiff has not presented a case which calls upon the court to apply the doctrine contended for. The plaintiff has brought an action against the city authorities, and one of the four successful bidders, viz., the Eureka Fire Hose Manufacturing Company. There is no effort on the part of the plaintiff to restrain the city officials from carrying out the contract with the other three bidders who were awarded a part of this contract. Suppose the court should grant the relief prayed for? How would this enforce the principle contended for, while the city authorities are left to carry out the contracts with the other three. If the plaintiff had really desired to do what his counsel contended for in argument, he would have done what was done in the case reported in the 8th N.P.(N.S.)—brought his action to restrain the authorities from carrying out any of the contracts and not a single one of them.

As I have already indicated, I see no reason whatever for holding that the director was guilty of any abuse of power, because he let this contract to the Eureka Fire Hose Manufacturing Company at a price higher than was bid by its competitors, because of the superior quality of its hose. Upon what principle of equity or justice, which is the rule of action prescribed for the court in such cases, can the court enjoin one of these contracts, while allowing the others to stand? The court can not interfere because the contract price is too great, and the plaintiff has not sought to enforce the other principle contended for, because he has not made the other contracting parties defendants to this suit.

This leads me to suggest, although I would not undertake upon this preliminary hearing to absolutely decide it, if the decision turned upon that, that there is much in this case that points strongly to the conclusion that this tax-payer is but a figure-head by which an unsuccessful bidder seeks to enjoin his successful rival, and the court will not lend its aid to any such

1914.]

Roberts v. Columbus.

effort. During a two days hearing this plaintiff never appeared or manifested any interest in the case, while the agent of the Fabric Fire Hose Company was the only witness who did appear to manifest any interest in the suit. This conclusion is powerfully reinforced by the fact that the plaintiff has not sought to enjoin the contract with the Fabric Fire Hose Company, or the others, who were awarded a part of the contract for the hose, but apparently seeks to protect the other bidders in their contracts, while attacking the Eureka Fire Hose Manufacturing Company alone. In this state of the case, it is difficult to escape the conclusion that the real party prosecuting the case is the agent of the Fabric Fire Hose Company. But, however that may be, the plaintiff has not appealed to this court for any relief which will in any way be an enforcement of the principle for which alone he contends. I am of opinion the contract which is sought to be enjoined is a judicious one for the city, and there could have been no complaint by any one if the entire amount had been awarded to the Eureka Fire Hose Manufacturing Company, and as the plaintiff has not made any case here which calls upon the court to apply the principle contended for, that the director could not split up the contract, there is nothing in the case as presented which calls upon the court to grant the relief asked, either as preliminary or final.

For this reason the application for a temporary injunction must be denied.

CHARGE OF COURT WITH REFERENCE TO NEGLIGENCE.

Common Pleas Court of Hamilton County.

WILLIAM C. DORY v. CHARLES S. SEBALD.

Decided, 1913.

Negligence—Burden Always Upon Plaintiff to Avoid or Rebut the Issue of His Own Negligence, Either Sole or Contributory—Charge of Court.

1. When a plaintiff brings an action for damages because of the alleged fault—negligence—of the defendant he must always be ready to meet as his issue his own fault, either as the sole proximate cause, or as one of two proximate causes, concurrent and contemporaneous, *i. e.*, contributory negligence. The burden of avoiding such negligences is upon the plaintiff.
2. When a defendant sets up contributory negligence, he admits his own negligence and seeks to avoid its consequences because the plaintiff too was at fault. The burden of asserting this contributory negligence is upon the defendant.
3. Thus in such actions it is always proper for a court to say to the jury, "If both were at fault, the plaintiff can not recover."

For statement see opinion.

Marston Allen, for the plaintiff, cited:

Glass v. Wm. Heffron Co., 86 Ohio St., 70; *Behm v. Traction Co.*, 86 Ohio St., 209; *Traction Co. v. Forrest*, 73 Ohio St., 1; *Traction Co. v. Stephens*, 75 Ohio St., 171; *B. & O. R. R. Co. v. Whitacre*, 35 Ohio St., 627; *Street R. R. Co. v. Nolthenias*, 40 Ohio St., 376; *B. & O. R. R. Co. v. Lockwood*, 72 Ohio St., 586; *McNutt & Ross v. Jacob Kaufman*, 26 Ohio St., 127; *The Cincinnati Interurban Co. v. Haines*, 8 C.C.(N.S.), 77; *McDonald & Co. v. Miser*, 2 C.C.(N.S.), 313.

Benjamin F. Harwitz and *Victor Heintz*, for the defendant, cited:

Behm v. Traction Company, 86 Ohio St., 209; *Railway v. Ritter*, 67 Ohio St., 53.

DICKSON, J.

On motion for a new trial.

1914.]

Dory v. Sebald.

The plaintiff filed a motion for a new trial for many reasons, but in arguments oral and written, abandons all grounds except one, certain alleged errors in the court's charge.

A general exception to the charge was noted by plaintiff's counsel after the jury had retired—too late to avail, because such an exception then could not possibly give the court an opportunity to remedy an error. The court feels justice has been done in this case, but will offer voluntarily an opinion on its charge, hoping the plaintiff who lost may feel that justice has been done.

The action is for personal injuries caused by defendant's negligence.

The defendant denies negligence on his part and claims that the alleged injuries were caused solely by the plaintiff's negligence. The defendant has in his answer the words "contributory negligence," but nowhere did he admit or did he *intend* to admit his own negligence. Thus contributory negligence as an affirmative issue by the defendant is not in this case. The reply was not necessary, but in effect it denies the plaintiff's negligence.

The parts of the court's charge alleged to be at fault are, "The failure to use reasonable care by either or both would be a breach of duty. A breach of duty is a fault. In order to recover, the plaintiff must have been without fault and the defendant at fault, and that fault of the defendant must have been the proximate cause of the accident; that is such fault as without which the accident would not have occurred. *If both were at fault the plaintiff can not recover.* If neither were at fault the plaintiff can not recover." And again, "*The burden of proof is upon the plaintiff to maintain the issues here.*"

The plaintiff asserts that his rights were injured when the court thus mentioned the fault of both parties—thus mentioned contributory negligence and then placed the burden of avoiding this fault upon the plaintiff.

Counsel for plaintiff fails to appreciate that in actions of this kind; plaintiff's negligence is always present as an element to be overcome by him, either by keeping such an issue down, or if it appear, by rebutting it; and that to avoid such negligences, sole and contributory, he has the burden.

The possible contributory negligence of the plaintiff which always exists as an element of a plaintiff's case, is never a part of a defendant's case. Such a burden remains with the plaintiff.

It is otherwise when the defendant sets up contributory negligence; then he admits his own negligence—admits his liability—admits the plaintiff's charge or claim—confesses as it were, and avoids by setting up the plaintiff's concurrent and contemporaneous negligence as a joint proximate cause, and is ready to maintain this issue by evidence offered by him. In such event the burden is upon the defendant, because such contributory negligence is then his issue and on which he must offer evidence. But, he may even rely upon the plaintiff's evidence alone; in which event he would not have the burden, even though he had plead contributory negligence. If contributory negligence appear in the presentation of plaintiff's claims, it certainly would not be error to mention it and to put the burden upon the plaintiff to remove it. To put such a burden upon the defendant would be gross prejudicial error. When a defendant admits negligence, he *pro tanto* admits his defeat, and when at the same time he asserts that the plaintiff too is negligent, he seeks to reinstate himself and to drive plaintiff out of court on all the issues. Then and then only the burden as to contributory negligence is on the defendant.

This opinion is in harmony with *The Columbus Railway Company v. Ritter*, 67 Ohio St., 53, at 59. The court "erroneously placed upon the plaintiff below the burden of disproving contributory negligence charged in the answer as part of her case in chief."

It also is in harmony with *Behm v. Traction Company*, 86 Ohio St., 209; and does not conflict with *Glass v. The William Heffron Company*, 86 Ohio St., 70, where it is held that, "It is neither prejudicial to the defendant nor erroneous to instruct the jury that the burden of proving contributory negligence of the plaintiff is upon the defendant," because in the *Glass* case the court does not pass upon the question as to who has the burden when the contributory negligence of the plaintiff appears in the presentation of his own case. This opinion does not conflict with any Ohio Supreme Court case.

1914.]

State, ex rel, v. Wright.

**RIGHTS OF A REJECTED APPLICANT FOR A LIQUOR
LICENSE.**

Superior Court of Cincinnati.

THE STATE OF OHIO, ON RELATION OF WILLIAM W. DAUGHERTY,
v. ROGERS WRIGHT AND WILLIAM MARCHHEUSER, CON-
STITUTING THE HAMILTON COUNTY LIQUOR
LICENSING BOARD.

Decided, December, 1913.

*Intoxicating Liquors—Applicant for License Rejected Because Quota
Full—Entitled to a Hearing, When—Mandamus to Compel Granting
of Hearing—Registration of Protest.*

1. Where there are more applications made for liquor licenses than there are licenses to be granted, and the only reason for the rejection of a certain application is that the constitutional quota has already been filled, the endorsement of "full quota" on the application is a sufficient statement of the reason for rejection, within the meaning of Section 28 of the liquor license code.
2. Where an applicant possesses all the qualifications required by law for obtaining a liquor license, and his application is rejected for the sole reason that the quota is full, such rejected applicant is entitled to a hearing by the county licensing board, the same as an applicant rejected for any other reason, as provided in Section 29 of said code.
3. Where such rejected applicant has been denied a hearing by the county board, and thereupon makes application promptly to a court, prior to the fourth Monday in November, for a writ of mandamus, a peremptory writ will be granted, even after licenses have been issued, to compel the board to grant such rejected applicant a hearing as provided by law.
4. An applicant is as much a citizen after his application is rejected as he was before, and as such has a right to register protests, not only against the granting of applications for licenses but also in favor of the revocation of licenses already granted, and when a county board refuses him leave to register such protests mandamus will lie to compel it to do so.

*H. P. Karch and J. J. McCartin, for relator.
John A. Deasy, contra.*

SUTPHIN, J.

This is an action by the State of Ohio, on the relation of William W. Daugherty, against the two members of the Hamilton County Liquor Licensing Board, in which it is prayed that a writ of mandamus issue against said board compelling them to permit the filing of protests against the granting of liquor licenses to certain alleged unqualified applicants and for a hearing thereon, and further to compel the said board to grant a reconsideration and hearing upon the application of the relator for a liquor license, and for such other and further relief as the relator may be justly entitled to.

To this petition of the relator defendants filed a demurrer, in which they set forth several grounds, the only one, however, which is urged upon this court being that the petition does not state facts sufficient to constitute a cause of action. The effect of the filing of a demurrer is to admit that the allegations set forth in the petition are true, and therefore the sole question presented to this court is whether upon the facts stated in the petition the relator is entitled to the relief prayed for. A brief statement of the facts so pleaded is as follows:

The relator, Daugherty, is a citizen of the United States, and the last four years past has been a resident of Hamilton county, state of Ohio; since April, 1910, he has been engaged in the retail liquor business, which he has always conducted according to law; that on or before September 15, 1913, he made application in due form to the defendant board for a liquor license, at which time he possessed all the qualifications required by law. His application was rejected without cause; on or about November 18, 1913, he learned that the defendant board proposed to issue licenses to certain applicants who did not possess the qualifications required by law, some of whom lived in his vicinity; he thereupon demanded of the defendant board the right to file and have heard protest against the granting of such licenses, which was refused; he also demanded a hearing upon his own application which had been rejected, but this was also refused. He claims that unless the board is compelled to grant him these hearings he will suffer an irreparable injury for which he has no adequate remedy at law.

1914.]

State, ex rel, v. Wright.

In addition to the facts set forth in the petition, there are certain other facts which have been mentioned in argument and in briefs of counsel, of which the court has been asked to take judicial notice. A reference to them is perhaps helpful to a better understanding of the case under consideration. These facts are that in Hamilton county alone there were some thirteen hundred applications for saloon licenses on file with the board September 15, 1913, whereas under the constitutional limitation only eight hundred and two licenses could be granted. The list of those to whom the board proposed to grant licenses was first made known and published November 5, 1913. Of the five hundred applications which were rejected, over three-fourths were rejected without any cause except that the quota was full. Subsequently thereto, to-wit, on November 17, 1913, fifty-seven of those on the proposed list were rejected and their places filled by selections made from the original rejected list. All licenses allowed were issued November 24, 1913, which was the fourth Monday in November.

The petition was filed in this court on November 20, 1913, and an alternative writ of mandamus was issued, notice of which was duly served upon the defendants. The effect of the issuance of this writ was to order the defendants to comply with the prayer of the petition or show cause before the court, at a specified time, why they should not do so.

A determination of the questions in this case involves a careful examination of the constitutional amendment, Article XV, Section 9, adopted September 3, 1912, and an act of the Legislature approved May 3, 1913, commonly known as "the Ohio Liquor License Code," 103 Ohio Laws, 216. Prior to the adoption of this constitutional amendment Section 18 of the schedule of the Constitution of Ohio read as follows:

"No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the General Assembly may, by law, provide against the evils resulting therefrom."

A history of the liquor laws of this state is not only interesting, but is helpful in understanding the effect of the constitutional amendment of September, 1912. Prior to the Constitu-

tion of 1851 there was no constitutional provision on the subject, but laws were in force prohibiting the sale of liquor except by duly licensed tavern keepers. Certain difficulties were encountered which led to the abolishment of licenses and the vesting in the General Assembly of the power to legislate on the subject. In other words, while the state was not willing to give its approval to the traffic in intoxicating liquors, such as might be implied from an affirmative grant of licenses, yet it recognized the existence of the business itself and desired to clothe the General Assembly with power to legislate concerning it (*Bloomfield v. State*, 86 O. S., at 261).

The Legislature has exercised this power in various ways, such as the imposition of a heavy tax upon the right to conduct such business. While that section of the Constitution was a continuing admonition to all persons engaged in the traffic, that in doing so they were always subject to the power of the General Assembly to provide against evils resulting from the traffic, yet at the same time one who conducted such business in a lawful manner was entitled, under the law as it existed, to the same protection which was accorded to dealers in other articles of personal property. *State v. Hipp*, 38 O. S., 199, at 222.

Under the constitutional amendment of September, 1912, this order of affairs was completely changed, and the state was expressly authorized to issue a positive, actual grant which secures to the grantee a specific, definite right to traffic in intoxicating liquors. Our Supreme Court has defined a license, in *State v. Frame*, 39 O. S., 399, as follows:

“A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least not enjoyed by a class of citizens to which the licensee belongs.”

The constitutional amendment of September, 1912, definitely and positively prescribes that there shall not be more than one saloon for each five hundred population in municipalities. This is followed by provisions that licenses shall not be granted to any applicant—

1. Who at the time of making application (a) is not a citizen of the United States. (b) is not of good moral character.

1914.]

State, ex rel, v. Wright.

2. Who is in any way interested in the business conducted at any other place.

3. Unless he is the only person in any way pecuniarily interested in the business for which the license is sought.

4. Unless the place of traffic is located in the county or in an adjoining county to where persons reside whose duty it is to grant such licenses.

After licenses have been granted they shall be deemed revoked,

1. If any other person than the licensee is in any way pecuniarily interested in the business.

2. If the licensee is convicted more than once for the violation of any liquor laws.

This brings us to the provisions of the act of the Legislature known as "the Ohio Liquor License Code." After providing that applications for license shall be filed between September 1st and September 15th, and setting forth in detail what such application should contain, the statute provides that it shall be the duty of the board to announce the names of those to whom the board proposes to grant licenses not later than November 5th, at which time the board shall also announce the list of those applications which it proposes to reject. In other words, when all the applications are filed on September 15th the board has until the 5th of November, if it sees fit to take that full period of time, to determine what applications shall go on the "proposed list" and what applications shall go on the "rejected list." Each rejected applicant is entitled to have endorsed upon his application the reasons for its rejection, and it is the absolute and specific duty of the board to so endorse such applications. The rights of such rejected applicant are set forth in Section 29 of this code in the following language:

"In all cases where an application is rejected, the applicant shall be given a hearing upon the announcement of the said rejection by the county board. The said rejected applicant shall upon the day of the rejection be notified by the secretary of the county board of the fact of rejection, and shall be given a list of the complaints, if any, made against him, her, it or them, with the names and addresses of the complainants. Said notification shall be in writing and shall specify the time for a

hearing on the application so rejected, which shall take place at the office of the board not more than five days after notice is given."

This same section provides that such rejected applicant shall have the right to be present at the hearing, either in person or by counsel and the mayor as well as the prosecuting attorney of the county shall have the right to be present at such hearings, and notice shall be sent to such officers at the same time notice is sent to the applicant.

The act further contemplates that the board might recall its original decision as a result of such hearing, as shown by Section 31 of the act, which reads as follows:

"If after a hearing, the said board recalls its decision and grants the application, and in so doing rejects the application of another applicant whose name was contained on the announced list of applications proposed to be granted, the applicant thus alternately rejected shall be entitled to a hearing with all the privileges and under the same conditions mentioned in the foregoing sections."

In other words, such a hearing might result in the rejection of an applicant whose name was on the proposed list, and the recalling of a prior decision of rejection, and the granting of the application of the applicant first rejected. The section goes on to say:

"But all decisions as to the rejection of applicants, who shall have applied prior to the beginning of the license year, shall be final on the fourth Monday in November following, at which time the licenses allowed shall be issued."

Another significant provision of this act is Section 27, which reads as follows:

"Any citizen may register with the county board protests against the granting of licenses or in favor of the revocation of any license. Said protests shall set forth the facts upon which the complaint is based, and shall be signed and sworn to by the complainant or complainants."

From this it will be observed that while the right to protest against the granting of licenses might be exercised at any time

1914.]

State, ex rel, v. Wright.

up to the fourth Monday in November, it would seem that it could be more intelligently exercised only after the list of proposed licensees had been published. On the other hand, the right to protest in favor of the revocation of any license necessarily could not be exercised until the license is granted, which would be after the fourth Monday in November. In this connection the county board is given express power to revoke a license, as provided by Section 16 in the following language:

“It shall be the duty of the county liquor licensing boards of the respective counties of the state, and they are hereby authorized * * * to suspend or revoke, subject to the conditions and in the manner provided by law, all licenses granted or renewed in said county.”

Applying these statements and conclusions of law to the facts in this case, we find that the relator made application for a license, and on November 5th was informed that his application had been rejected. He complains, first, that this rejection was without cause, or rather, that the only cause endorsed on the petition was “full quota.” As there were many more applications for a license than there were licenses to be granted, it is impossible to see what else the board could have endorsed upon his application. Such endorsement indicates quite clearly that no complaints had been filed against his application, and that no information had been discovered by the board which would warrant the refusal of his application. It was simply a case where the power of the board had been exhausted by the allowance of the full quota of licenses provided by law.

The relator next contends that as a rejected applicant he was entitled to a hearing by the board, and the language of Section 29 above quoted, would seem to justify his claim. The defendant very adroitly contends that if the applicant was rejected only because of “full quota,” a hearing for him would be “a vain and useless thing,” that therefore common sense dictates that the act did not contemplate giving a hearing to such a rejected applicant. This raises a very serious question, because if such construction is correct it would render nugatory the clause granting a hearing to rejected applicants. It is a well es-

established principle of law that in the construction of statutes it is the duty of the court to give full consideration to every word in the statute and to construe the law as meaning what it says, if it can possibly do so. Now, a careful examination of Section 29 above quoted, would seem to indicate quite clearly that the right to a hearing does not depend upon the existence of complaints—it merely provides that if there are any complaints, the rejected applicant is entitled to be furnished with a list of them before the hearing is had. For example, suppose the applicant was rejected because of some complaints filed against him, and, after having been furnished with a list of such complaints, appears before the board at a hearing and is successful in convincing the board that the complaints are unfounded, what then; it does not mean that he will necessarily receive a license. The board may still reject him because the quota is full, in which event such applicant would be in no different position than the applicant who was originally rejected because the quota was full. Would the court therefore be justified in concluding that there was no purpose to be served by the granting of such hearing? The court is not concerned with the question as to what the Legislature intended to enact, but with what is the meaning of that which it did enact. The language is clear and comprehensive, and therefore it should be held to embrace all cases fairly coming within its term, if they are also within its reason and spirit. The court can well understand that such a rejected applicant might desire to take advantage of his right to a hearing for the purpose of appealing to the discretion of the board. The court has no power to interfere with such acts of discretion on the part of the board. But that is not saying that a rejected applicant might not make a strong appeal for reconsideration if he had the opportunity of a personal hearing, especially when it is realized that the board in making selections as between equally eligible applicants could only justify their selections as the exercise of due discretion on their part, which the court is bound to presume was a reasonable exercise of same until the contrary is shown. A rejected applicant would naturally be interested in creating a vacancy, because he would have just such a chance of being selected to fill it as would be proportionate

1914.]

State, ex rel, v. Wright.

to the number of other rejected applicants. He might have knowledge or information regarding a proposed licensee which has not been brought to the attention of the board, and which would affect their action. He might have information tending to show that a proposed licensee does not possess the constitutional requirements. If such information was brought to their attention, the board would in the performance of their duties be obliged to at least give it careful consideration and perhaps take steps either to refuse a license or even to revoke a license already granted, after a proper hearing.

The court therefore can not say just what might take place at such a hearing. Section 31 of the code reads, "If after a hearing, the said board recalls its decision and grants the application," etc., which clearly indicates that the board might change its ruling as the result of such hearing; it might recall its decision and even grant a license to an applicant originally rejected. In other words, such a result is within the express contemplation of the statute. It follows therefrom that the court would be unwarranted in saying that such a hearing would be a vain or useless thing, and the court therefore holds that the relator in this case should have been afforded such hearing.

That right or opportunity for a hearing was denied the relator in this case—that is his complaint. No right of appeal was granted him under the act, and therefore he came into this court on November 20th and asked that the board be directed to grant him such a hearing. The board had notice of his application to this court and took no steps to grant him a hearing, but comes into court now and says that even if he should have had a hearing prior to November 24th it would be useless for the court to order them to grant him a hearing now because the time has passed when the hearing would be of any avail to such rejected applicant. Such contention appeals to the court as unfair and unreasonable, and the court is not prepared to say that such a conclusion would find support in a reasonable and proper interpretation of the statute. A hearing afforded this rejected applicant even now might result in the revocation of licenses already granted, which would immediately create an unfilled quota, and this relator would not

only have a chance of being selected to fill such vacancy but the public would be benefitted by having licensees eliminated who did not possess the constitutional qualifications.

It may be said that if a hearing was to be given every rejected applicant in this county it would have been almost impossible to have held all the hearings called for within the limited time above set forth. The court can readily understand the force of such observation, but because there are difficulties to be met with in the enforcement of this law would not furnish any reason why the provisions of this law should not be enforced, especially when the failure to do so might cause irreparable injury and loss to the person affected. It is the well established policy of the law to grant every person a hearing, whether he stands accused of some crime or of some civil liability, or where the state proposes to take from him some property right. We must therefore infer that the provisions of this liquor license code were designed to adhere to that well established policy of the law, and, before finally rejecting the application of a person who had been engaged in this particular line of business for many years, he should be given a chance to be heard, a chance to confront his accusers if there were any, all with the view that when this local board reached a conclusion it would be a just conclusion, based upon a full hearing accorded to such applicant.

There is still another question in this case. The relator witnessed the switching of the fifty-seven cases on November 17th—the re-filling of an already full quota—and learning that certain of these newly proposed licensees were not eligible and did not possess qualifications required by law, went before this board and asked leave to file, and have heard, protests against the granting of licenses to such applicants. He appeared before them not only as a rejected applicant, but as a citizen, and as such had a clear and unqualified right to protest against the granting of any licenses or to urge the revocation of any licenses already granted, as provided in Section 27 above quoted, and the board was entirely without authority in refusing him leave to register such protests. Counsel for defendants says that the board was justified in doing so because the petition does not

1914.]

State, ex rel, v. Wright.

state that the complaints were in writing and sworn to, as required by law. Such a contention begs the question—the relator complains because he was refused leave to file such complaints, and the court will presume that if he had been granted permission he would have filed complaints in the manner and form required by the statute.

Furthermore, if such protests or complaints charged that a proposed licensee was lacking in any of the required constitutional qualifications, such as is alleged in the petition, a decision as to whether a hearing should be granted would not rest in the discretion of the board, but it would become the absolute duty of the board to notify the party complained of, furnish him with a copy of the complaint, and set a day for a hearing. This is of the utmost importance because if such charges proved to be true the board would have had no power to grant such person a license, and whether such charges were well founded or not could only be determined after a hearing had been had. To give any other interpretation to the law would be to render it unconstitutional, because the Constitution expressly provides that *the applicant must possess certain qualifications at the time of making application, and that a license shall not be granted to any one who does not possess such qualifications*. While such a hearing should be had promptly, it is immaterial whether it is had before or after November 24th, because the result would be the same—the rejection of an application in the one case, or the revocation of a license in the other.

This liquor license law in many particulars is complex and involved. It would seem to be designed primarily for those counties in which the number of applications for licenses fall within the constitutional limitation. It is unfortunate that its provisions do not more clearly express and define the rights of those whose applications were rejected for no other cause than that the quota was full.

However, looking at the law as an entirety, it would seem that the Legislature has endeavored to carry into this act the spirit of the Constitution. This constitutional amendment expressly authorizes the state to grant a definite right to traffic in intoxicating liquors and, in order to protect the public from

the evils incident to such business, imposes strict requirements prominent among which is that the applicant shall possess good moral character. The legislative provisions granting the right to hearings and the right to file protests would seem to be designed for the purpose of creating an automatic balance between those applicants who have been rejected and those who have been accepted. Those who, though possessing the qualifications, have been denied the right to carry on such business have an incentive to watch more closely the conduct of those to whom licenses have been granted, and the likelihood of protests from this class, as well as from any citizen, must necessarily furnish a constant stimulus to a high standard of conduct and obedience of the law by licensees.

In conclusion, the court is of the opinion that the relator was entitled to a hearing upon his rejection, and as it was not granted to him he is entitled to that hearing now; further, that the relator was entitled to file protests against the granting of licenses to those who did not possess the constitutional qualifications, and as that right was denied him at the time complained of, the board should grant him leave to file such protests now; that as licenses have been issued, the board should cause hearings to be had upon such complaints to the end that if the board should be satisfied that such licensees do not possess the constitutional requirements, their licenses should be recalled or revoked and given to those possessing the qualifications whose applications were rejected merely because the quota was full.

Therefore the demurrer will be overruled, and unless the defendants desire to plead further, the court will grant a peremptory writ in accordance with the conclusions above stated.

1914.]

Cincinnati v. Railway.

OCCUPATION OF STREET BY RAILWAY TRACKS.

Common Pleas Court of Hamilton County.

**CITY OF CINCINNATI V. THE PITTSBURGH, CINCINNATI, CHICAGO &
ST. LOUIS RAILWAY COMPANY.**

Decided, January, 1913.

*Ordinance—Validity of, Where Granting the Right to Lay Five Railway
Tracts Across a Public Street—Depends Upon the Reasonableness
of Such Use of the Street, Which is a Question of Fact—Restora-
tion of Street to Former Condition.*

1. In an action by a municipality to enjoin a railway company from laying additional tracks across a certain street, and to compel the railway company to restore the street to the condition which it was in before the existing tracks were laid, an answer by the railway company alleging that it has complied with the terms of a certain ordinance, which grants the right to lay the proposed tracks, raises an issue of fact as to such compliance which can only be determined upon a full hearing, and even a showing that the street has not been restored to its former condition would not necessarily render the ordinance inoperative.
2. A court can not declare that the laying of five railway tracks in the street constitutes an unreasonable and unwarranted disregard of the rights of the public in the street and therefore should be enjoined, but the question is one of fact which must be determined from all the circumstances in the case.

Coleman Avery, Assistant City Solicitor, for the demurrer.

Maxwell & Ramsey and *Jos. S. Graydon*, contra.

GEOGHEGAN, J.

Heard on demurrer to amended answer and amendment there-
to.

The action is brought to compel the defendant to restore Lud-
low street, between Front street and the river, to the condition
that it was in prior to the time of certain alleged acts of the
defendant, which the petition recites caused certain material
damage to the surface and grade of the street, and the petition
further seeks to enjoin the defendant from laying and con-

structing certain tracks upon and across Ludlow street upon the claim that the construction of said tracks will impair the use by the public of said street for pedestrian and vehicular traffic and will destroy the usefulness of said Ludlow street as a public thoroughfare.

The facts involved in this case were before this court and the Supreme Court once before in the case of *Hall v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company*, the defendant herein. In that case an injunction was granted the plaintiff Hall by reason of the fact that the proposed construction of said tracks would materially impair and interfere with the owner's egress, the injunction to continue until the defendant had acquired the right as against the said Hall by proper appropriation proceedings.

The defendant's amended answer and amendment thereto prays to have the petition dismissed on the ground that it has the right to lay said tracks across said street by reason of an ordinance of the city of Cincinnati dated July 17, 1905, and accepted by defendant August 11, 1905, a copy of the ordinance being attached to the answer.

The said ordinance grants to the defendant the right to lay and maintain across Ludlow street five certain tracks, or, to be more particular, three tracks and switch leads for two additional tracks, and provides how they shall be built and what means the company must take in order to keep the street open for the use of vehicular and pedestrian traffic, and the ordinance further provides for the restoration of the street.

The demurrer of the city solicitor is based largely upon the theory that the setting up of this ordinance does not constitute a denial of the facts alleged in the petition as to the condition in which the said defendant put and has left the street.

Now, as the ordinance provides in what condition the street must be placed and kept after the construction authorized by the said ordinance, it would seem that an allegation in the answer that the ordinance has been complied with would at least constitute some denial of the allegations of plaintiff's petition as to the condition of the street. Under the terms of the ordinance it would have a right to tear up the street for the pur-

1914.]

Cincinnati v. Railway.

pose of exercising the right to lay the tracks granted by the ordinance and it would have a reasonable time to repair said street. Even if it be conceded that the allegation of compliance with the ordinance does not constitute a denial of the city's claim in this respect, I do not think that for the single reason that defendant has failed to keep the street in repair, this court, upon the application of the city of Cincinnati through its city solicitor, without action of the legislative body of the city, should declare this ordinance null and void. The fact that it had failed to comply with the condition with reference to repairs would not of itself render the ordinance absolutely null and void, but might be made the basis of an application to the court for an order compelling it to comply with the terms, or even the basis of a revocation by council of the license granted by it in the passage of the ordinance.

Therefore, as the ordinance in this aspect stands and a compliance with the terms of the ordinance is alleged and these terms require the restoration of the street, it would seem that it is a question of fact, to be determined on full hearing, whether or not the allegations as to the condition of the street are true.

The solicitor further contends that the laying of the said tracks in the street would constitute the using of said street for railroad yard purposes and therefore under the doctrine laid down in the case of *Rockport v. Railroad Co.*, 85 Ohio State, 73, that a railroad company has no right to appropriate public streets for an unlimited number of tracks over and across the same for yard purposes, the council of the city of Cincinnati had no right to pass this ordinance authorizing the defendant to construct these tracks.

I do not understand this to be the exact point involved in the Rockport case. In that case the trial court found *upon the evidence* that the railroad company had a right to appropriate the public streets for railroad yard purposes but the Supreme Court, while recognizing that under the provisions of Section 3283, General Code, railroad tracks may be laid over and across a public highway, nevertheless held that the rights of a railroad company are not absolute and at the will of the company but must be ex-

exercised with reasonableness and with due regard to the rights of the public, and that it is the duty of the trial court to determine from the evidence whether or not the number of tracks proposed to be constructed would be destructive of the public easement in the streets, or an unreasonable interference therewith.

Admitting for the purposes of this demurrer that this limitation upon the right of the railroad company to appropriate would constitute in the nature of things a limitation on the right of the legislative body to grant, nevertheless, the question is one of fact and must be determined from the evidence, and this court can not say, as a matter of law, that because a city council grants the right to lay five tracks in the street, it constitutes an unreasonable and unwarranted disregard of the rights of the public in the street and therefore should be enjoined. Whether or not it is unreasonable is a question of fact which must be determined upon a full and complete hearing of the cause. It can be plainly seen that under certain circumstances a less number than five tracks might be an unreasonable usurpation of the rights of the public in a public street, while, under other circumstances and in other places, five or more tracks might not constitute such usurpation.

For these reasons it would seem that the defendant has the right to set up in defense of this action its contract with the municipal corporation, under the ordinance granting it the right, and upon a full hearing of all the facts and surrounding circumstances the court must determine whether or not the proposed use of the street is reasonable, having in view the rights of the public.

The demurrer will therefore be overruled.

1914.]

Ex Parte Scott.

**VALIDITY OF THE ACT LICENSING TRAFFIC IN
INTOXICATING LIQUORS.**

Common Pleas Court of Hamilton County.

EX PARTE WILLIAM C. SCOTT.

Decided, December 19, 1913.

*Constitutional Law—Section 9 of Article XV of the State Constitution
Not in Conflict with the Fourteenth Amendment of the Federal
Constitution—Policy of Ohio Legislation with Reference to Traffic
in Intoxicating Liquors.*

1. The effect of the state constitutional amendment of September 3, 1912, is not to relieve the business of trafficking in intoxicating liquors from any of the burdens theretofore placed upon it, nor does it place this traffic upon the same footing as other callings and occupations, but on the contrary further restrictions and burdens were placed upon the business with a limitation on the number and class of persons who may be engaged therein.
2. Neither is said amendment, nor the act of the Legislature passed in pursuance thereof, in derogation of the Fourteenth Amendment of the Federal Constitution.

Max Levy, for petitioner.

P. J. Dempsey and *John A. Deasy*, Assistants to the Attorney-General, and *Bernard C. Fox*, Assistant City Solicitor, contra.

GEOGHEGAN, J.

The petitioner in his application for a writ of habeas corpus sets forth that he was unlawfully imprisoned by William Cope-lan, chief of police of the city of Cincinnati, on the pretended charge that he, the said William C. Scott, sold intoxicating liquors without having been licensed as provided in Section 1261-63 of the General Code of Ohio, and that the said statutes relating to the licensing of dealers in intoxicating liquors are unconstitutional, the same being in violation of Section 1 of Article I of the Bill of Rights of the Constitution of Ohio, and of the Fourteenth Amendment of the Constitution of the United States.

The answer of the chief of police is that he holds the body of the complainant by virtue of a warrant issued under Section 1261-63 of the General Code of Ohio.

The issue presented on the argument of counsel and from the application and the answer thereto is that the act of the General Assembly, known as "An act to provide for license to traffic in intoxicating liquors and to further regulate the traffic therein; to establish a state liquor licensing board and county licensing boards; to define their powers and duties and to amend Sections 6065 and 6071, General Code, of Ohio," is unconstitutional and void as being in violation of Section 1 and Article I of the Bill of Rights of the state of Ohio and of Section 1 of the Fourteenth Amendment of the Federal Constitution.

As to the proposition that the law in question is in violation of Section 1 of Article I of the Bill of Rights, it is sufficient to say that prior to the constitutional amendment of September 3, 1912, which is the amendment under which the law is drawn, no license to traffic in intoxicating liquors could be granted by the Legislature, but the Legislature had the power under the Constitution of 1851 to regulate the sale of intoxicating liquors in the state. Therefore, at the amendment of September 3, 1912, expressly retained in force existing local option laws and other regulatory measures that had been passed by the Legislature, it is clear that the effect of the constitutional amendment of September 3, 1912, was not to relieve the business of trafficking in intoxicating liquors from any burdens that had theretofore been put upon it. Nor could it have been the intention to put it on a footing with other callings and occupations, for the reason that if that were so, then these local option measures and regulatory measures could not be justified in the proper exercise of the police power of the state. But the very fact that they have been retained, when their only justification is the exercise of the proper police power of the state, indicates that the people of this state, by the amendment of September 3, 1912, known as Section 9 of Article XV of the Ohio Constitution, intended simply to put more restrictions and burdens upon the business and to restrict the number and class of persons who

1914.]

Ex Parte Scott.

might engage in it. There is no natural or common right in every citizen to engage in the liquor traffic, unless it is granted by Sections 1 and 2 of Article I of the Ohio Constitution, and yet nevertheless these provisions have been part of the Constitution since the admission of Ohio to the Union, and notwithstanding this under the Constitution of 1851 the people of Ohio prohibited the granting of a license to the business and authorized the Legislature to regulate the business, which if it did not mean to prohibit altogether, meant at least to restrain and restrict its operation. And further, in September, 1912, the people amended Section 9 of Article XV so as to limit the number of persons engaged in liquor traffic to one in every five hundred, and to grant those persons licenses from time to time. Therefore it must not be assumed that the people in adopting the latter amendment could have contemplated granting a right which, if it existed at all, must have been recognized by the Constitution in Sections 1 and 2 of Article I since the formation of the state. The natural conclusion is that the people, therefore, have only intended that further restrictions should be put upon the business of trafficking in intoxicating liquors, and that the adoption of a license system is a limitation and restraint upon the traffic.

The next question arises as to whether or not Section 9 of Article XV of the act of the Legislature referred to above and passed by authority of said section is in conflict with Section 1 of Article XIV of the Federal Constitution, which among other things provides:

“Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.”

It would seem that the propositions, that in so far as the states are engaged in the legitimate exercise of the police power, they are not hampered by any provision of the Federal Constitution, and that the right to regulate and even prohibit the traffic in intoxicating liquors is within the police power of the state, are too well settled to need citation of authority;

nevertheless, I have been almost overwhelmed in this case by an avalanche of authorities, and I have carefully and conscientiously reviewed them because of the importance of the question herein involved to a great number of persons, who, if this act is valid, will under its operation be deprived of their former means of livelihood and will be compelled to seek new businesses and new occupations.

Whatever may be said as to the fundamental merit of the proposition that, in the regulation and prohibition of the liquor traffic the states are within their proper police power, it has become so thoroughly entrenched as a part of our system of government that one must follow the rule whether he agrees with it in conscience or not. It would be useless for me to cite a great number of authorities for the proposition that a citizen of a state can not claim the privilege under the Fourteenth Amendment, of entering into or remaining in a business or calling which might affect injuriously the health, good order, good morals, peace or safety of society. It is sufficient to note the following: *Slaughter-House Cases*, 16 Wallace, 36; *Bartemeyer v. Iowa*, 18 Wallace, 129; *Cronin v. Denver*, 192 U. S., 109; *Ohio, ex rel, v. Dollison*, 194 U. S., 445; *Beer Co. v. Mass.*, 97 U. S., 25; *Fertilizing Co. v. Hyde Park*, 97 U. S., 652; *Mugler v. Kansas*, 123 U. S., 623; and numerous cases.

In *Ohio, ex rel, v. Dollison*, 194 U. S., 445, which was a case wherein the constitutionality of the Ohio law known as the "Beal law" was in question, Justice McKenna says:

"Plaintiff in error further urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the state the equal operation of the criminal laws, and this he charges against and makes a ground of objection to the Ohio statute. This objection goes to the power of the state to pass a local option law, which, we think, is not an open question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. *Cronin v. Adams*, 192 U. S., 108. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas was sustained. *Rippey v. Texas*, 193 U. S., 504."

1914.]

Ex Parte Scott.

In *Beer Co. v. Mass.*, 97 U. S., 25, it is held in the third paragraph of the syllabus:

“All rights are held subject to the police power of a state; and, if the public safety or the public morals require the discontinuance of any manufacture or traffic, the Legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience.”

The case of *Trageser v. Gray*, 73 Md., 250, is in many of its aspects analogous to the case at bar. In that case a board of three commissioners was established with power to grant licenses to sell liquor at retail. Applicants were required to file certain affidavits with the board, and the act further provided that the license should be granted only to citizens of the United States of temperate habits and good morals. The plaintiff, a native of Prussia, applied for a license, which was refused him. He applied for a writ of mandamus, and the sole question presented was whether or not the statute was a valid and constitutional enactment under the provisions of Section 1 of Article XIV of the Federal Constitution, and in that case the Court of Appeals of Maryland held that it followed the principles laid down in the Slaughter-House Cases and the long line of cases which held that the proper exercise of the police power on the part of a state does not invade the rights, privileges and immunities granted by the Fourteenth Amendment to the Federal Constitution.

So, it seems clear that if the act in question is a proper exercise of the police power, it is not in violation of the Fourteenth Amendment. However, counsel for the petitioner makes the point that the act is discriminatory in its nature inasmuch as it provides that only one person to every five hundred shall be granted a license, and that therefore in denying to persons the right to obtain a license when a sufficient number of licenses have been granted in any political subdivision as equals the ratio of one to five hundred, its tendency is to create a monopoly in favor of some, and therefore deny to others the equal protection of the laws. However, this precise proposition has been passed upon, by no less great authority than the Supreme

Court of Massachusetts, in the case of *Decie v. Brown*, 167 Mass., 290. The Massachusetts act provided that the number of places to be granted licenses should not exceed one to each one thousand of population, and the complaint was made that the board authorized to grant licenses would have granted the license to complainant had it not been for that restriction, and it was contended in his behalf that the law not only conflicted with Article VI of the Declaration of Rights of the Constitution of the commonwealth, but also with Article XIV, Section 1 of the amendment to the Constitution of the United States, precisely the same contention as is made here. In passing upon that contention the court says, at page 291:

“It is too late to question the validity of such statutes. This one does not differ in substance from any statute which forbids the carrying on of a trade or business, or the exercise of a profession, by other than licensed persons. Such statutes are upheld because the resulting exclusion of unlicensed persons is not designed to confer on those who are licensed an exclusive benefit, privilege, or right, and where that result does follow it is merely the collateral and incidental effect of provisions enacted solely with a view to secure the welfare of the community. See *Hewitt v. Charier*, 16 Pick., 353; *Commonwealth v. Blackington*, 24 Pick., 352; *Commonwealth v. Kimbell*, 24 Pick., 359.

“The limitation of the number of licensed places within the territory of a town or city is a reasonable exercise of the police power, and therefore is not in conflict with the Constitution of the Commonwealth or the Fourteenth Amendment to the Constitution of the United States.”

In the Slaughter-House cases, wherein the doctrine here relied upon was first proposed, the Supreme Court of the United States held that a statute of Louisiana which granted a practical monopoly in the slaughter-house and butcher business to certain persons was not in conflict with the Fourteenth Amendment, but was a proper exercise of the police power, which in its proper exercise is always and must necessarily be discriminatory.

And in *Trageser v. Gray*, *supra*, the court in discussing the question of discrimination uses this language, at page 259:

1914.]

Ex Parte Scott.

"The statute now before us oppresses no one and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violation which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests and embraces all means which are necessary and proper to protect the public from evils connected with the subject. Assuredly the Supreme Court did not consider this control as limited by the necessity of making an equal distribution of favors, when it said in speaking of the trade in liquor and its consequences: 'The police power which is exclusively in the states is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' *Mugler v. Kansas*, 123 U. S., 659. Nor is any such limitation consistent with the decisions in *Stone v. Mississippi*, 101 U. S., 814; *Beer Co. v. Massachusetts*, 97 U. S., 25; and *Fertilizing Co. v. Hyde Park*, 97 U. S., 659. In one of these cases a franchise which had been purchased from the state was taken away from the purchaser without compensation to him, because it was considered by the Legislature to be hurtful to the public morals. In the other two cases, by the exertion of the police power, property of vast amount was rendered valueless, although it had been acquired under the express sanction of the Legislature. It is needless to refer again to the Slaughter-House cases, where there was a severe discrimination in favor of a single corporation and against every one else, solely because the protection of the public health was involved."

It would seem unnecessary to cite further authority with reference to the right of the state either by direct act or by the conference of powers upon commissioners or other licensing bodies, *to limit the number of persons to whom licenses should be given*, yet in passing it might be well to refer to a few of these that sustain that proposition, and this I shall do by mere citation. *Freund on Police Power*, Section 211; *People v. Hoy et al*, 98 N. Y., 145; *In re Jugenheimer*, 81 Neb., 836.

In the foregoing cases it was expressly held that in the exercise of the police power the state had the right to limit the

number of saloons in any given locality as a proper exercise of the police power of the state.

Before passing this subject I wish to refer to two cases cited by counsel for the petitioner as being contrary to this proposition. In the case of *Leon Levy, ex parte*, 43 Arkansas, 42, at page 52, the court said:

"There are some trades and occupations confessedly dangerous, either as to health, or safety, or morals. Government has the inherent power to regulate or prohibit them. It is not presumed that constitutions meant to prohibit this salutary exercise of power. The retail of liquors is one of them. As lawful as any other, when permitted, and as fully entitled to protection, it is nevertheless in questions of giving or withholding permission, considered as dangerous.

"If the Legislature, recognizing this danger, had prohibited the retail of liquors generally, making it unlawful to any one to keep a dram shop, and had at the same time recognized a certain public necessity or convenience to be met by the existence of a limited number of places for such houses; and had provided that the assent of the people having been first obtained, the county court might grant such number of licenses as it might deem best; it would be just such a statute as the Jefferson Court construed this to be. Although private profits might attend the privilege, they would not be in the contemplation of the law, nor within its purposes. The intention of such a law would be the relaxation of a general prohibition for the benefit of the public in certain localities upon the expression of the desire of a majority of the inhabitants of those localities, and to do so only to the extent which the proper local tribunal might deem best. Although such a selection might result in an exclusive power to sell in the hands of those selected, we think it could not fairly be considered a monopoly in the sense of the constitutional prohibition, but rather a police regulation for the public good. This view of a definition of a monopoly is sustained by the court in the *Slaughter-House Cases*, 16 Wallace."

While it is true that under the circumstances of that case the court was compelled to hold that every one who was otherwise qualified for the license should receive one, nevertheless this was solely because the Legislature had not seen fit to limit the number of dram shops, as the court calls them, and that

1914.]

Ex Parte Scott.

therefore under the provision of the Arkansas Constitution the county court had no right to discriminate between persons equally qualified.

In *Meyer v. Decatur*, 125 Ill. App., 556, at page 560, the court distinguishes the ordinance therein involved which reserved an arbitrary discretion as to the persons who should get a license and those cases wherein the political subdivisions had by ordinances or laws limited the number of licenses, and the court says:

“It is clearly distinguishable from the ordinance enacted by the village board of Hyde Park reserving to the board a discretion to determine the number of dram shops the public good required. *People v. Creiger, supra* (138 Ill., 401). The further provision in the same section, reserving to the city council the right to limit the number of licenses to be issued, is merely declaratory of a right vested in the city council by the Legislature. Such right can, however, only be exercised through an ordinance fixing the number of licenses to be issued, or providing some uniform method by which the number shall be determined.”

I think from the citations above it will be clearly seen that the objections made by the petitioner to the constitutionality of this law are against the great weight of authority. Whatever may be said as to the propriety of this kind of legislation, it has become so strongly intrenched as a question of policy that one court has said there is an inherent right in the people to regulate the retail liquor traffic, which right existed prior to the time that constitutions and laws were written.

Some statement was made in the argument that the operation of this law had the result of depriving those who were not granted licenses of their property without due process of law. This is sufficiently answered by referring to the case of *Adler v. Whitbeck*, 44 O. S., 539, wherein our own Supreme Court says at page 574:

“It is averred that, from a long time prior to the enactment of this law, the plaintiffs have been engaged in the traffic of intoxicating liquors, and have had a large amount of property invested in the business; and it is claimed that the law can not

be made applicable to them without impairing vested rights. The claim is not tenable. It would subvert the power to provide against the evils of the traffic, and place it superior to any regulation whatever. The provision of Section 9, Article XV (Section 18 of the schedule) of the Constitution has stood, since its adoption, as a perpetual admonition to all persons engaging in the traffic, that, in doing so, they place their property, invested in the business, subject to the power of the General Assembly to provide against evils resulting from the traffic. The same argument was made in *Miller v. State, supra*, against the act of 1854 prohibiting among other things, the sale of liquor to be drunk on the premises where sold; but it met with no favor in the court. The law was held valid. See opinion of Thurman, J., in the case 3 Ohio St., 484-7.

"No prescriptive right can be claimed by persons engaged in the whisky traffic against the exercise of its functions by the Legislature of the state. It was said by Taney, C. J., in the License Cases, 5 How. (U. S.), 577: 'If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.'"

I have studied carefully the propositions herein involved. I have made an examination of the great number of authorities presented by counsel on both sides. While there is a great deal to be said in behalf of the petitioner herein and those similarly situated from the standpoint of natural justice, nevertheless, it seems that the policy of the government as laid down in the vast number of cases, some of which I have cited, is to hold that the traffic in intoxicating liquors is a business in which a man enters at his peril and that he is to be subjected to such restrictions and changes as the people in the exercise of their judgment deem necessary. It is only natural that in the carrying out of this policy, more or less arbitrary power must be left to boards or individuals and it seems that the authorities countenance the leaving of a large discretion to the boards and commissions which are designated to carry these laws into effect.

That there is no objection to the exercise of some discretion on the part of administrative officers is clearly in the doctrine

1914.]

Ex Parte Scott.

laid down in *Robinson v. Kerrigan*, 151 Cal., 40, at page 49, wherein the court passes upon the exercise of discretionary and somewhat judicial powers of administrative officers and holds that the exercise of such powers is a necessary function in any executive department in so far as it does not encroach upon the exercise of powers that are purely judicial in their nature.

I therefore am compelled to hold, in view of these authorities, that the amendment of September 3, 1912, now known as Section 9 of Article XV of the Ohio Constitution, as well as the act of the Legislature passed in pursuance of said delegation of power, are not in conflict with Section 1 of Article XIV of the amendment to the Federal Constitution.

Considerable was said during the argument of this cause concerning the wisdom of this legislation as well as an alleged defective and unjust conferring of arbitrary power upon the licensing board. It is not my part to question the wisdom of this legislation, nor to correct by a judicial decision any alleged mistakes that the Legislature may have made in devising the operation of this law. The petitioner herein presented himself to the court squarely upon his constitutional rights, and as I have pointed out before, these rights have not been invaded. If the state has a right to pass a law regulating the traffic in intoxicating liquors by limiting the number of persons who engage in that traffic to a certain proportion of the population, and to further require them to apply for a license, and to provide a penalty for the engaging in the traffic without first having been licensed, then this petitioner has no standing in court on his writ of habeas corpus, but must stand trial on the charge that is preferred against him. That the state has such a right is clear and conclusive in the light of all the authorities heretofore cited and commented upon.

The application for the writ of habeas corpus will therefore be denied.

**INVALID SERVICE BY PINNING SUMMONS ON BACK DOOR
OF RESIDENCE.**

Common Pleas Court of Cuyahoga County.

FRANK KLETCHKO v. C. H. SHUPP & SON AND WILLIAM BROWN,
JUSTICE OF THE PEACE.

Decided, November 17, 1913.

*Service of Summons—What is Meant by Leaving Copy at Usual Place
of Residence—Section 10237.*

Service of summons to be in conformity with the Ohio statute must be made under such circumstances and be of such a character that it may fairly be presumed the defendant received it. This requires, where the service is not personal, that a copy of the summons with all the endorsements thereon be either pushed under the front door of the defendant's residence, or dropped into an aperture in the front door for the reception of mail, so that it may be said the summons was left within the dwelling; or if it be delivered to some member of the defendant's family, the one receiving it must be of such age and discretion and must bear such relation to the defendant that it may fairly be presumed he received it, and delivery so made to a member of the family must be at a door of the defendant's residence or on a porch thereof.

Spear, Mills, Knight & Godfrey, for plaintiff.

Christopher & Robblee, contra.

FORAN, J.

This is an action by the plaintiff to enjoin the defendants from enforcing and collecting a judgment rendered against him by the defendant Brown, as justice of the peace, and in favor of the other defendants, for the reason, as plaintiff avers, that he was never served with summons, and that for that reason the court was without jurisdiction in the premises, and the judgment is therefore void and of no effect.

The return of the constable is in due form, and shows that the summons was left at the plaintiff's usual place of residence on or about March 13, 1913. The plaintiff positively swears that he never received or saw the summons, and had no knowledge that the action was pending against him on the day the judgment was rendered. The plaintiff's mother, apparently the

1914.]

Kletchko v. Shupp & Son.

only other person in plaintiff's residence on the day the summons purports to have been served, also testified that she never saw the summons or the constable who claims to have served it, nor did she hear him ringing the bell or otherwise giving any intimation that he desired admittance to the residence of plaintiff on that day.

The testimony of these witnesses is clear and positive, and stands uncontradicted except by the return and the testimony of the officer or constable who testifies that on the day of the return he went to the plaintiff's residence, repeatedly rang the front door bell, and, failing to obtain entrance there, proceeded to the back door, where he was also unsuccessful, and thereupon he pinned a copy of the summons on the back door of the residence, using two pins in so doing.

Ignoring the testimony of plaintiff and his mother, can it be said, upon the evidence of the constable, that there was such service upon the plaintiff as the law contemplates?

The statute relating to the commencing of actions and service in justice courts, Section 10237, General Code, provides that the defendant may be served with process in an action begun or against him by delivering to him personally a copy of the summons, together with all the endorsements thereon, or by leaving such copy at his usual place of residence at least three days before the time of appearance.

It will be admitted as elementary, that service or service of summons means the judicial delivery of a summons or a copy thereof to the opposite party, so as to charge him with notice of the receipt of it and subject him to its legal effect.

Section 10235, General Code, provides, among other things, that the summons must describe the plaintiff's cause of action in such general terms as to apprise all defendants of the nature of the claim against them.

A defendant of course can not be apprised of the nature of the claim against him unless he in fact receives a copy of the summons or has notice that the action has been begun or is pending against him. The delivery need not be personal; it may be constructive; but when it is constructive, it must be of such character as to charge the defendant with notice of the action

and subject him to the consequences or legal effect of such notice. The statutory requirements relating to such notice must be strictly construed. *Britt v. Hagerty*, 11 O. C. C., 115. See also 30 O. S., 344, and 41 O. S., 285.

As indicating this strict construction, it has been held that a return showing service at the defendant's place of business is not sufficient. 25 O. S., 336.

The return must show it was at defendant's residence, and not his house. 15 O. S., 288.

To obtain service on a man, no advantage must be taken; and if he is decoyed or induced to come into the jurisdiction of a court in a county other than his own, for the purpose of obtaining service upon him, the service will be set aside. Authorities need not be cited in support of this proposition. When a man is sued, it is fundamental that he should be heard and have opportunity to present his defense, if he has any. This is not only a statutory but a constitutional right.

What is meant by the phrase; "At his usual place of residence"? This depends largely upon the construction of the word "at" as used in this phrase. This word is "a preposition of extremely various use, primarily meaning to, without implication, in itself, of motion. It expresses position attained by motion to, and hence contact, contiguity. * * * Being less restricted as to relative position than other prepositions, it may in different construction assume their office, and so become equivalent, according to the context, to in, or, nor, about, under, over, through, from, to, toward," etc. . Century Dictionary.

Familiar examples of the use of this word will suggest themselves. At the center may mean in the center. At the top may mean on the top and usually does. At Cleveland means in Cleveland. At the corners, when it indicates a place, may mean in or about the corners or near the corners. At the bend of the river means near or about the bend of the river. To go in at the front door means to go in through the front door. At the court room means a room in the court house. To determine the sense in which this word is used in any case, the subject-matter with reference to which it is used must be taken into consideration. We determine its meaning from the context or from the

1914.]

Kletchko v. Shupp & Son.

words or sentences preceding or following it. See *Rogers v. Galloway*, 64 Ark., 627. When it precedes the name of a place and denotes situation, it frequently means the same as in or within. If we take into consideration the subject-matter with reference to which it is used, as giving notice to a man that he has been sued, it ought to mean in the residence in the phrase "at his usual place of residence." In ordinary speech, at more generally means within than without. At a town, city or county means at some place within the town, city or county, rather than a place at the verge of or in but not within the town, city or county (*Chesapeake & Ohio Canal Co. v. Key*, 5 Fed. Cas., 563). At the court house means within the court house. *Harris v. State*, 72 Miss., 960.

Where a statute provides that the declaration be served by delivering a copy thereof to the defendant, or by leaving the same with a white person of the family of the age of ten years or upwards, at the dwelling-house of the defendant, if he is absent, it may be delivered to one who is at or near the dwelling, but it must be delivered at the steps or on the portico or some appurtenance immediately connected with the dwelling or family mansion (*Kibbe v. Benson*, 84 U. S., 624). While this statute permitted service or provided for service by the delivery of the paper to some white person of the family of ten years of age or upwards, yet because of the words "at the dwelling-house," it was held that service must be made at the steps, portico, or some place that really was a part of the mansion or house. Service some feet away, even though the paper was delivered to the person named in the statute, was held not to be sufficient. In other words, the statute was strictly construed.

We are of the opinion that, under the Ohio statute, the service must be made under such circumstances and be of such a character that it may fairly be presumed the defendant received it; and any service that does not meet this requirement will be, and ought to be, held void and insufficient.

A man not temporarily absent from home will be presumed to be either at his residence or go there some time during the day or evening. It will be further presumed that when returning to his residence he will enter through the front door. He may

enter through the rear or side door, but ordinarily he will enter through the front door; and it will not be presumed that he will usually or ordinarily enter through the back or rear door. Hence it must be held that pinning a summons on a back or rear door of a residence does not constitute service upon the owner of the residence, within the meaning of the statute. To hold otherwise would lead to abuse, injustice and injury, if not actual fraud. The ease with which the paper could be removed by an interested party, the curiosity of the ubiquitous and mischievous small boy, or even of the delivery man, the liability of winds and storms to detach and blow it away, destroys the legal presumption that the defendant received it. To constitute service under this statute, where the service is not personal, a copy of the summons with all of the endorsements thereon, must either be placed or shoved under the front door, or dropped into an aperture in the front door for the reception of mail; so that it can be said it was within or in the dwelling; or secondly, it must be delivered to some member of defendant's family of such age and discretion and bearing such relation to the defendant that it may fairly be presumed the defendant received it. And such delivery must be made or take place at the doors of the residence or on the porch or a porch thereof. Delivering it to a member of the defendant's family some distance away from the dwelling or residence would not be sufficient. Placing such copy in an unlocked mail box belonging to the residence but some distance therefrom, or even attached to some portion of the residence, would not be sufficient. If the copy is delivered to a member of the defendant's family, having such relation with the defendant and being of discretionary age as to raise a presumption that the defendant received it, or if it be delivered to a servant who comes to the door in response to the officer's ring or knock, or if it is placed under the front door so as to be within the residence, a legal presumption arises that the defendant received it, and this presumption can only be overcome by clear and convincing evidence.

We have been unable to find any Ohio authority bearing directly upon the question or point raised.

The prayer of the petition is granted, and the temporary restraining order is made perpetual.

1914.]

State, ex rel, v. Fosdick.

**VALIDITY OF NON-COMPETITIVE EXAMINATION PARAGRAPHS
OF THE CIVIL SERVICE LAW.**

Superior Court of Cincinnati.

THE STATE OF OHIO, EX REL THOMAS C. CARNES, v. PHILIP C.
FOSDICK, DIRECTOR OF PUBLIC SERVICE OF THE
CITY OF CINCINNATI.

Decided, March 2, 1914.

Constitutional Law—Non-competitive Examinations Under the Civil Service Law—Not a Provision for Exercise of the Appointing Power—Nor is there a Privileged Class Created—Equal Protection and Uniform Operation of Laws—Section 486-10, General Code.

1. The last paragraph of Section 10 of the civil service act of May 10th, 1913 (103 Ohio Laws, 698, 703) is not repugnant to the Constitution of the state as an exercise of the appointing power (Article II, Section 27); nor does it violate the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. (Article II, Section 26.)
2. The last paragraph of Section 10 of the civil service act of May 10th, 1913 (103 Ohio Laws, 698, 703), which continues in service incumbents who have not been appointed under previous civil service laws, conditioned upon their passing non-competitive examinations, is not in violation of Section 10, Article XV of the Constitution of Ohio, which provides for the establishment of civil service in this state, nor is it obnoxious to the constitutional principle which forbids the creation of a privileged class and the denial of the equal protection of the law.

Moulinier, Bettman & Hunt, for relator.

Walter M. Schoenle, City Solicitor, and *Charles A. Groom*, Assistant City Solicitor, contra.

PUGH, J.

On January 25th, 1912, the relator, Thomas C. Carnes, was appointed assistant foreman in the filtration department of the water works of the city of Cincinnati. On April 28th, 1913, the General Assembly enacted the civil service act which went into effect January 1st, 1914. On January 10th, 1914, the relator was removed from the position to which he had been appointed almost two years before, and shortly thereafter brought this action wherein he prays that a writ of mandamus may be issued

ordering the defendant, the director of public service, to reinstate him in the position from which he was so discharged.

The relator was appointed by the then director of public service at a time when the position of assistant foreman was included in the unclassified civil service, but in March, 1912, the existing civil service commission adopted a rule by which the position, together with some others, was included in the classified service, where it has remained ever since. The relator when appointed did not take any examination of any kind as to merit and fitness nor was any required of him when the position was transferred to the classified service.

It is claimed by counsel for defendant, as preliminary to their main contention, that the relator was not legally appointed to the position he held and was therefore subject to removal at any time, and the case of *State, ex rel, v. Lea, Director*, 10 Ohio N.P.(N.S.), 364 (affirmed without report), is cited to sustain this claim. This case decides that, when a civil service statute is in effect, appointments to public employment in the classified service must be made in accordance with such statute and that, when an appointment has been made without the requirements of the statute having been complied with, such appointee is not protected by the provisions of the civil service law and may be discharged without any formality whatever.

The law that governed matters of this kind in January, 1912, when the relator was appointed assistant foreman of the filtration plant, is contained in General Code, Section 4479—now superseded by the existing civil service act. This section divided the civil service into the unclassified and the classified service, and proceeded to enumerate those positions which constituted the unclassified service, and this was followed by this sentence:

“The classified service shall comprise offices and places not included in the unclassified service.”

Among the positions of the unclassified service, the statute included “persons who are appointed to positions requiring professional or technical skill *as may be determined by the civil service commission*,” and, toward the end of the section, “unskilled laborers.”

1914.]

State, ex rel, v. Fosdick.

“Unskilled laborers” were therefore placed in the unclassified service by the statute itself, but persons occupying positions requiring “professional or technical skill” might be in either class according as the civil service commission deemed best for the public interest. In March, 1913, the existing civil service commission adopted a new code of rules whereby, among other things, all “unskilled laborers receiving not more than \$2 per day” were placed in the unclassified service, but those receiving more than that sum were included in the classified service. The position of assistant foreman held by the relator was thereby transferred to the classified service. It is not entirely clear why the division of unskilled laborers into two classes was made in this way, but, apparently, the commission regarded all those laborers who received more than \$2 per diem as possessing such degree of “professional or technical” skill or knowledge as warranted their inclusion in the classified service.

Be that as it may, it is not material in this case to inquire whether the civil service commission exceeded its powers in March, 1912, in transferring the position held by the relator from the unclassified to the classified service. If the rule by which this was done was void, as claimed by counsel for the defense, the appointment of the relator on January 25th, 1912, still held good and he remained assistant foreman of the filtration plant in the unclassified service just as he was before. A rule that was void could in nowise affect him. But it is material to notice that, on January 1st, 1914, when the new civil service act took effect, he was an incumbent of a position which, under that law, was “in the competitive classified service” and therefore as will presently appear, under the last paragraph of Section 10 thereof, he could not be discharged or removed from that position except as therein provided.

Coming now to the main contention in the case, it is claimed that, assuming the relator on January 1st, 1914, was a legal appointee of the position of assistant foreman of the filtration department, the civil service act which went into effect on that day, contained nothing which legally prevented his superior officer from discharging him at pleasure since the only provision of the act to the contrary was invalid in that it violated several sections of the Constitution of the state.

State, ex rel, v. Fosdick.

[Vol. 15 (N.S.)]

The circumstances of the relator's discharge, as shown by the undisputed testimony, were these:

About four o'clock, on the afternoon of Saturday, January 10th, 1914, the relator was shown a typewritten paper which read as follows:

"NOTICE.

"It is the order of the Director of Public Service that the services of the following men be dispensed with. This order takes effect at 4 P. M. January 10th, 1914. F. Yungbluth; Harry Carnes; C. Roush; Thomas Carnes; Grover Green; John Figgins.

"Filtration Plant. (Signed) J. W. EILMS,
"January 10th, 1914. *Superintendent of Filtration.*"

The relator was permitted to read this paper but no copy of it was given him, and he was also told by word of mouth that he was discharged. No other formality of any kind was observed, except that, later on, the director of public service filed with the civil service commission the following document:

"CINCINNATI, JANUARY 27th. 1914.

"CIVIL SERVICE COMMISSION,

"City Hall.

"*Gentlemen:* This is to advise you that Thomas Carnes, employed as laborer, River Station, W. W., left the service of this department on the 10th day of January, 1914, for the following reasons:

"Services no longer necessary and for further economy.

"PHILIP FOSDICK, Director of Public Service Department.

"Per P. S. JOHNSON, Officer.

"*Secretary.*"

It has already been held by this court, in the case of *State, ex rel. v. Schneller*, 15 N.P.(N.S.), —, that, in so far as the removal of incumbents of offices and positions was concerned, the civil service act of May 10th. 1913, took effect January 1st. 1914. The director of public service, therefore, should have followed the provisions of that statute in discharging the relator on January 10th, 1914, but it is apparent, at first glance, that he failed to comply with them in two important respects.

Section 8 of the act, following former enactments, divides the civil service of the state, the counties, cities and city school districts thereof, into the unclassified and the classified services,

1914.]

State, ex rel, v. Fosdick.

and the position of assistant foreman of the filtration plant is plainly included in the classified service as therein made.

The relator, as stated, was appointed to a position which, at the time, was under the unclassified service and when, several months after, the place was transferred to the classified service, he was not required to undergo any examination as to his merit and fitness. His right, however, whatever it might be, to continue in the public employment on and after January 1st, 1914, depended upon the construction and validity of the last paragraph of Section 10 of the new law, which is as follows:

“The incumbents of all offices and positions in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive examinations shall be given in such manner as the commission may require and all such non-competitive examinations shall conform in character to those of the competitive service.”

On January 10th, 1914, the relator was an incumbent of a position in the competitive classified service and in the opinion of the court he did not hold such position under any civil service law as meant by the above statutory language. The provisions of the civil service act relating to the discharge or removal of incumbents of such positions, are as follows:

“Section 2. * * * On and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act.”

The above provision must be read in connection with Section 17 of the same act, which is as follows:

“Section 17. No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended, or otherwise discriminated against by the appointing officer for religious or political reasons. *In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish*

the subordinate discharged, laid off, reduced or suspended with a copy of the order of discharge, lay off, reduction or suspension, and his reasons for the same and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission."

Assuming that the above provisions of the new law are valid, it is obvious that, *first*, no "copy of the order of discharge" was ever furnished the relator as required by Section 17 above quoted, and, *second*, no copy of such order of discharge was ever filed by the public service director with the civil service commission as prescribed thereby, and that the discharge was therefore illegal.

It is idle to pretend that the paper shown Thomas Carnes, on January 10th, 1914, is such an "order of discharge" as is contemplated by Section 17 of the civil service act. The most important qualification of "discharge" as prescribed by the statute, is that the "reasons" therefor shall be given and a copy of the "order of discharge" be furnished the person discharged so that he may know why he is removed, and, if there be charges against him, may answer or explain them. The document filed by the director of public service with the commission is equally objectionable; it does not even purport to be a copy of an "order of discharge" but, at best, is a mere notice that the relator "left the service" some seventeen days before for reasons given therein.

For answer to the above the defendant claims that the last paragraph of Section 10, above quoted is invalid in that it violates the Constitution of the state in several important particulars. If this claim is well founded, there is nothing in the civil service act which warrants the continuance of the relator in the public employment and the director of public service was justified in discharging him.

(1). It is contended that the paragraph in question is invalid because it violates Article II, Section 27, of the Constitution of Ohio, which forbids the exercise by the General Assembly of what is known as the "appointing power."

The argument is that, on January 1st, 1914, when the present civil service act took effect, there were many incumbents of offices

1914.]

State, ex rel, v. Fosdick.

and positions throughout the state, holding state, county and municipal positions, who had been elected or appointed without having undergone examinations of any kind as to their merit and fitness and were not incumbents under any previous civil service law, all of whom, but for the last paragraph of Section 10 of the new law, were subject to discharge or removal at the discretion of the appointing officer. The effect of the paragraph in question is to continue them in office indefinitely and this, it is claimed, amounts in effect to the appointment by the General Assembly of these incumbents to these positions and offices.

The court, however, is of the opinion that this provision of the civil service act does not constitute an appointment to office or position. As pointed out in argument, the act was passed April 28th, 1913, was approved May 5th, 1913, and filed in the office of the Secretary of State, May 10th, 1913, while the incumbents of offices and positions who are conditionally continued in office or position are not those who were incumbents when the statute was enacted, but those who might be incumbents of such offices and positions on January 1st, 1914. A period of eight months intervened between the time when the statute was enacted and when it went into force. There existed no means of ascertaining on May 10th, 1913, when it is claimed this appointing power was exercised, who these so-called appointees would be. While it was possible, and, in some instances probable that those persons who were incumbents of public offices and positions in the spring of 1913, would remain as such until January 1st, 1914, on the other hand, it was equally possible, and in some instances just as probable that many changes would take place in the interval. The effect of the new law, under these circumstances, even though it operated to continue in place those who were in public service at the time the law was enacted, can not be considered as an appointment. Appointment to place or office presupposes a definite, identified appointee or appointees, and a provision that those persons might be in place eight months thereafter is not an exercise of the appointing power. It is quite likely that some of the incumbents affected by this act occupied positions which were created or came into existence for the first time after the passage of the statute. With the exception of those incumbents holding offices and positions under former

civil service laws (to whom no objection is made in this case) most of those in public service in April and May, 1913, were appointees for indefinite periods of time and liable to removal at any time at the discretion of the appointing officers or boards, and doubtless many of them were removed after May 10th, 1913, and before January 1st, 1914.

This view of what is meant by the appointing power is fully borne out by the decisions in analogous cases in this state. See *Gleason v. The City of Cleveland*, 49 Ohio St., 431, 437, a case that goes much farther than the one at bar. In the case of *State, ex rel, v. Hall et al*, 2 Ohio C.C.(N.S.), 237, exactly the same claim as is made here was urged against a statute which continued indefinitely in service the existing police force under conditions not unlike those provided for in the existing civil service act, and much of what is said by the court in upholding the statute in that case applies here. The statute makes no appointments but operates on appointments already made; it does not provide that incumbents shall remain in service in any event, but only if they pass civil service examinations of the same character as those imposed upon applicants for employment under competitive classified service; it does not continue in service incumbents whose terms had expired, nor does it extend the period of service of those incumbents whose terms of service are definite periods of time fixed by law.

For these reasons the court feels fully warranted in declaring that the paragraph of Section 10 objected to is not an exercise by the Legislature of the appointing power as claimed by the defendant.

(2). It is further objected that the paragraph of the civil service act in question violates the first clause of Article II, Section 26, of the Constitution of the state, which reads as follows:

“All laws of a general nature shall have a uniform operation throughout the state.”

The court has been unable to appreciate fully the argument made in support of this objection. The civil service act of May 10th, 1913, and every section of it, including of course the paragraph objected to, is a law of a general nature, but wherein it fails to operate uniformly it is difficult to comprehend. By its

1914.]

State, ex rel, v. Fosdick.

express terms, it applies to all "offices and positions of trust, or employment, including mechanics, artisans, and laborers in the service of the state, and the counties, cities and city school districts thereof." Wherever in the state the conditions described in the last paragraph of Section 10 exist, the provisions of that paragraph operate and in exactly the same manner and upon the same class of persons. It is quite likely, as argued, that in some counties, cities and school districts there were incumbents of positions on January 1st, 1914, who had not been appointed under any civil service law, and that in other counties, cities and districts there were no incumbents at the time of such positions, and, possibly, in some places, no such positions existed. But this is not a legal objection; the law was none the less in force. All that the constitutional provision requires of a statute of a general nature is that, wherever, throughout the state, the same conditions exist, it shall affect and operate upon all concerned in the same way. In the inheritance tax case (*State, ex rel, v. Ferris*, 53 Ohio St., 314), it is said in the second proposition of the syllabus:

"A law of a general nature, which is in full force in every part of the state, complies with Section 26 of Article II of the Constitution, requiring laws of a general nature to have a uniform operation throughout the state."

The paragraph of the civil service act objected to answers the above description, it is in full force and effect in every county, city and school district of the state.

(3). The next objection to the clause in question is that it creates a privileged class in that it confers benefits upon those who were incumbents of positions on January 1st, 1914, which it denies to all other persons. This claim, if well founded, would make this provision obnoxious to Amendment XIV, Section 1, of the Constitution of the United States, as well as to the intentment if not the direct expression of the Constitution of the state, as it would be a denial of the equal protection of law to those excluded from the office-holding class. Under this law, incumbents of public positions on January 1st, 1914, who had been appointed to office without examination of any kind, are continued therein, if within say a twelve-month and after notice, they are able to pass civil service examinations, which are *non-competitive*,

while all others are required to undergo the stress of competitive examination, and this, it is argued, gives the former class an unfair and undeserved advantage over all others desiring public employment, in violation of the constitutional limitation mentioned and particularly and additionally in violation of the recent addition to the state Constitution (Article XV, Section 10), which reads thus:

“Appointments and promotions in the civil service of the state, the several counties and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.”

As stated by this court in a recent decision (*State, ex rel, v. Schneller*, 15 N.P.(N.S.), —, the civil service act of May 10th, 1913, creates an entirely new, self-contained and far reaching system which embraces within its provisions every office and position in the civil service of the state and its political subdivisions. In many respects, it is entirely different from any system ever before tried in this state. No matter at what particular time it was made to take effect, there would necessarily be found thousands, perhaps tens of thousands, of persons serving the state, the counties, cities and school districts thereof, in various positions of public employment, some elected, some appointed; some with terms fixed by law, others serving at the discretion of some appointing officer or board; some appointed under previous civil service laws and some under the so-called spoils system; and some of these offices and positions it was desired to include in the classified service created by the new law and others to leave to the discretion of superior appointing officers.

While the provision of the state Constitution under authority of which this statute was enacted (Article XV, Section 10) plainly discloses that it was intended that “merit and fitness” as determined by competitive examinations should be required of those holding public employment, none the less the parenthetical qualification, “as far as practicable” shows that the General Assembly recognized that rule could not be made absolute and that, in the nature of things, allowance would have to be made for exceptions.

1914.]

State, ex rel, v. Fosdick.

In some places, on January 1st, 1914, there were civil service commissions already in existence under former laws ready to take up the work of preparing examinations, eligible lists and the like, with such changes as were demanded by the new law, but in other places there were no such commissions in existence. In many places facilities for doing the work were not at hand and had to be provided. Many additional positions were included by the new law in the classified service and it was essential to notify the public and call for applicants.

Competitive examinations, as anyone who has had experience of them knows, take much time in the preparation of the tests or questions; the examinations themselves, and the determination of the relative standing of the competitors is work that can not be done in a hurry. Tests proper to be imposed upon applicants for one position would not be germane or relevant to applicants for others, and each particular position has to be dealt with separately. In the meanwhile, beginning January 1st, 1914, public business to a great extent would have come to a standstill or got behind or into confusion all over the state unless some provision was made for continuing in service the present incumbents. In the judgment of the Legislature, it was not "practicable" to put into operation such an extended, radical system as contemplated by the act of May 10th, 1913, without some provision for carrying on public business until the new arrangements could be completed, and the last paragraph of Section 10 was enacted for this purpose.

Whether, in view of the many offices and positions and the thousands of persons concerned, a better arrangement than that prescribed by the last paragraph of Section 10 of this act could have been made, it is not for the court to determine. The constitutional provision vested the General Assembly with the exercise of such discretion as was essential to ascertain in what instances competitive examinations were practicable and in what not, and the legislative action in this regard can not be controlled by the court.

It is true that the last paragraph of Section 10 of the civil service act provides for the retention of office and position by incumbents conditioned upon their undergoing non-competitive examinations, and that, apparently it would have been practicable

to require them to submit to competitive examinations at some time or other. On the other hand, it is true that by keeping in public employment those incumbents, who had already, in many cases at least, acquired experience and skill in their work, the community received a distinct benefit, and it was fully protected against incapable or incompetent servants by the requirement that within a limited time such incumbents should pass an examination as to merit and fitness of the same character as that which applied to the competitive service.

In view of considerations of this kind, courts have frequently held that provisions like those under consideration, whereby, when a new and far reaching system of civil service is inaugurated, incumbents of public positions are continued indefinitely in employment in order to prevent confusion and delay in carrying on public business, are valid although for a time they seem to discriminate in favor of some and against others. Such arrangements are obviously for the public benefit, though they may incidentally operate to the advantage of individuals. See the cases above cited, *State, ex rel, v. Hall et al*, 2 Ohio C.C.(N. S.), 237, and *Gleason v. The City of Cleveland*, 49 Ohio St., 431.

Laws in relation to the holding of positions of public employment are not enacted for the benefit of those who are to be appointed to such service but are intended in the interest of the public and they should be considered and construed by the courts from this standpoint. There is no property right to be appointed to or hold public office. The public employee is the public's servant and while it would be obviously unjust and impolitic to enact laws for the purpose of favoring one member or class of the community more than another in the matter of being appointed to or continued in public employment, it would be equally unjust and impolitic to deal with and construe laws of great moment and necessity to the public welfare as if the only matter to be considered was how they affected those who might be called upon to hold office under them. The latter would be to return to the point of view of those who advocate the spoils system by which every law is considered, weighed and approved or disapproved according as it affects the office holder or public employee and with little or no regard for the interest of the general public.

1914.]

State, ex rel, v. Fosdick.

The most firmly established and universally recognized rule of constitutional construction is that which, while recognizing the power of courts to declare invalid an act of the General Assembly, declares at the same time that such power must not be exercised if it can in any way within reason be avoided. Time and again, courts in every state have announced this rule and our own Supreme Court has not been among the least emphatic. All presumptions within reason must be applied to uphold statutes. Almost seventy years ago it was said by Judge Hitchcock of our Supreme Court, in deciding a case (*Lewis, Trustee, v. McElvain*, 16 Ohio, 347, 354):

“I am no advocate of legislative supremacy nor do I doubt the power and the duty of this court, in a proper case, to declare a law unconstitutional. I do not believe, however, that the General Assembly will ever pass a law with the intention of violating the Constitution. Nor can I ever consent to declare one of their acts void on this account, unless it is palpably against both the letter and spirit of that instrument. So long as there is *any, the least, doubt* upon the subject, the law must be enforced.”

In one of the last cases reported from our own Supreme Court (*State, ex rel, v. Miller*, 87 Ohio St., 12), Judge Donahue, in reaffirming the power of the court to set aside an act of the Legislature, cites Chief Justice Marshall (in *Fletcher v. Peck*, 6 Cranch, 87), as saying:

“The opposition between the Constitution and the laws should be such, that the judge feels a clear and strong conviction of their incompatibility with each other.”

In *Railroad Co. v. Commissioners*, 1 Ohio St., 77, 82. Judge Ranney thus states the same rule:

“It is never to be forgotten that the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority, and clear incompatibility between the Constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case.”

Again quoting Judge Donahue, *State, ex rel, v. Miller, supra*, p. 28:

"This then is the established doctrine in this state, and the discussion or citation of further authorities would be superfluous."

This doctrine appears to the court singularly applicable to the case at bar. The very thorough argument on both sides has brought out clearly the strength and weakness of the civil service act and especially of the disputed paragraph—the last one of Section 10, and has left upon the mind of the court the impression that the few sentences comprised in this paragraph are to a certain extent inconsistent with the rest of the statute, and that rigid and logical adherence to the rule "of merit and fitness to be ascertained, as far as practicable, by competitive examinations" had, in this single instance, been relaxed in some degree to meet the difficulties which it was foreseen would naturally follow such a radical change in the matter of the appointment to positions of public employment as was contemplated by this law.

If this provision is held invalid, the civil service act itself, it is true, will remain intact in every other particular, but the putting into operation of the comprehensive and effective system of civil service contemplated by the constitutional requirement above quoted and which the General Assembly has endeavored to create, will be postponed almost indefinitely, confusion and delay will ensue in the administration of public business, and the spoils system be given another lease of life. If it were plainly the duty of the court to set aside this enactment of the General Assembly, it would be done regardless of consequences, but no such duty is apparent; on the contrary, while there are difficulties in adjusting some of the provisions of the act to constitutional requirements, on the whole it is in accord therewith and as such should be upheld by the court.

In view of what has here been stated the court is of the opinion that the last paragraph of Section 10 of the civil service act of May 10th, 1913, the only one that has been challenged, does not violate any of the provisions of the Constitution.

The writ of mandamus will be issued as prayed for in the amended petition.

1914.]

Kunkle, executrix, v. Fisher et al.

CHANGE IN CONDITION OF TESTATOR'S PROPERTY SUBSEQUENT TO EXECUTION OF WILL.

Common Pleas Court of Williams County.

IDA M. KUNKLE, AS EXECUTRIX OF THE WILL OF JOHN M.
KUNKLE, DECEASED, v. MINERVA FISHER ET AL.*

Decided, 1913.

Wills—Distribution of Proceeds from Real Estate—Devised and then Sold by Testator—Will Speaks as of Date of Death of the Testator.

1. Upon the sale by a testator of devised real estate, the proceeds thereof will not be substituted for such real estate, unless expressly directed by the terms of the will.
2. A will speaks as of the date of the death of the testator, and a bequest to one of "all my personal estate left after my just debts and funeral expenses are paid," passes to such person all of the personal estate of the testator, notwithstanding a large portion thereof is money derived from the sale of real estate, by testator, subsequent to the execution of the will.

Edw. Gaudern, for plaintiff.

Bowersox & Peck, contra.

MATTHIAS, J.

Ida M. Kunkle, executrix of the will of John M. Kunkle, deceased, seeks the instruction of the court with reference to the provisions of the will of said John M. Kunkle, deceased.

By this will, which was executed February 5th, 1901, testator bequeathed to his wife, Ida M. Kunkle, all his personal estate left after his just debts and funeral expenses are paid. He also gives her the rents, uses and profits of his real estate for six years, and directs that his real estate shall then be sold, and the proceeds divided between his daughter and grandchildren, after paying the wife the value of her dower interest therein.

Said John M. Kunkle died May 4th, 1907, leaving said widow and next of kin named in the petition. At the time of the execution of said will testator was the owner of a farm consisting

*Affirmed by the Court of Appeals without opinion.

of eighty-nine acres, upon which he then resided. Some time after the execution of his will the testator sold sixty-nine acres of that farm and purchased another tract of land containing forty-three acres, and, later, sold that and at the time of his decease was in possession of the proceeds thereof.

We are called upon to determine the construction of this will, and the effect of the change in the condition of testator's property subsequent to the execution of his will and prior to his death.

It is our opinion that the general rule applies that a will speaks as of the date of the testator's death, the bequest being of a general character and not specific in its nature. While the discussion by the court in the case of *Pruden v. Pruden*, 14 O. S., 251, and *Kent et al v. Mahaffey et al*, 10 O. S., 204, is somewhat instructive, we can not regard those decisions as having application to the issue in the case at bar.

The rule applicable to the case at bar is well stated, in language pertinent, clear and conclusive, in 40 Cyc., 1205 and 1424. A will must be construed as operating according to the state of things existing at the death of the testator. A conveyance of devised property operates as an ademption of the property and, to that extent, is, in effect, a revocation of the will. A further rule there announced which is controlling in the case at bar is, that the proceeds of such sale, of which the testator died possessed, will not be substituted for the property itself, unless a direction so to do is found in the will.

A case quite in point is that of *Webster v. Webster*, 105 Mass. 538. Another case fully annotated is that of *Ametrano v. Downs*, 58 L. R. A., 719. It is to be observed that the bequest to Mrs. Kunkle was general, and includes all personal property owned by testator at the time of his death.

Our conclusion is, therefore, that Ida M. Kunkle is entitled to all of the personal estate left by the testator after the payment of debts and funeral expenses, and costs of administration, including the money on hand, from whatever source derived, and the real estate belonging to the testator at the time of his death shall be used, and later disposed of and proceeds divided, as provided by the terms of the will.

1914.]

Fulworth Co. v. Garment Workers.

**RIGHTS OF EMPLOYER AND EMPLOYEES DURING A
STRIKE OR LOCKOUT.**

Superior Court of Cincinnati.

**THE FULWORTH GARMENT COMPANY V. THE INTERNATIONAL
LADIES' GARMENT WORKERS UNION ET AL.**

Decided, December, 1913.

*Strikes—Combinations of Workmen and the Means They May Use
in Enforcing Their Demands—Picketing, Persuasion, and the Main-
taining of Patrols in Front of the Employer's Premises—Injunction
Against Interference by Strikers—Parties to such a Proceeding.*

1. The right of workmen to combine for their mutual benefit, and to quit work individually or in a body, provided such action is unattended by violence, destruction of property, or other interference with the rights of employers, is well-established; but this right is reciprocal, so that the employer may likewise discharge any or all of his employees, and, under ordinary circumstances, the court will not inquire into the reason for his action.
2. The employer has a right to determine in what manner his work shall be done, and to determine what kind of work each employee shall be required to do; and the employee or the organization of which he may be a member is not permitted to stipulate to the employer what particular portion of work shall be done by any one employee.
3. In the event of a strike by the employees, or of a lockout by the employer, such means may be employed to render the strike or lockout effective as are not in themselves unlawful or inconsistent with the rights of others. The former employees may meet new employees, so long as the latter are willing to be approached, and discuss with them the questions involved, and persuade them, if possible, to leave their new employment, provided that in so doing they violate no property rights and induce no breaches of contract; but the use of force, violence or intimidation is under no circumstances permissible, however lawful the strike may be.
4. The stationing of "pickets" near the premises of the employer is permissible so long as it is done for the mere purpose of observing what is going on, and obtaining such information as strikers are entitled to, or for the purpose of endeavoring to persuade, by orderly and peaceful methods, those who are willing to listen; but the keeping of patrols in front of, or about the premises of

the employer, accompanied by disorder or violence, or any manner of coercion or intimidation, to prevent others from entering into or remaining in his service, or the approaching of those who do not desire to confer with them, is unlawful; and if the purpose is to procure workmen to break contracts of employment, it will not be lawful even though conducted in a peaceable manner.

5. A court of equity has no criminal jurisdiction, nor will it ordinarily interpose by injunction to prevent the commission of a crime. But where there is interference with property rights and where the continuance of such interference will result in irreparable damage or a multiplicity of suits, a court of equity will intervene by injunctive process, and its jurisdiction is not destroyed by the fact that if the threatened offenses were committed they would amount to violations of the criminal law.
6. An equitable action for an injunction is a proceeding *in personam*, and the court will not ordinarily enjoin those who are not made parties to the suit. This is particularly true where the names of all those whom plaintiff desires to reach are in its possession, and where they may be made parties by either a supplemental petition or a proper entry.

Miller & Foster, for plaintiff.

Snyder & Dickerson, contra.

OPPENHEIMER, J.

Plaintiff is a corporation organized under the laws of Ohio and engaged in the manufacture of ladies' garments at No. 411 Race street, in the city of Cincinnati. Plaintiff files its bill in equity alleging that the several voluntary organizations and the several individuals who are named as defendants, together with others whose names are unknown, have conspired to injure plaintiff's business, by threatening, intimidating and offering violence to plaintiff's employees, in order to compel them to quit plaintiff's service.

The testimony in the case is quite voluminous, the trial having extended over a period of six days. It appears from the evidence that plaintiff had conducted a so-called "union shop," employing various members of the several defendant organizations, and that from time to time disputes had arisen between plaintiff and these organizations concerning employees whose work was apparently unsatisfactory, or whom, for other rea-

1914.]

Fulworth Co. v. Garment Workers.

sons, plaintiff did not desire to retain in its employment. These various disputes were ordinarily amicably adjusted between plaintiff and committees representing the several organizations.

Ultimately a dispute arose over one Philip Shinkelman, a garment worker who was a member of Local No. 98. Shinkelman had been employed by defendant for some time, and had been put to work upon sample garments which were being prepared by plaintiff for the use of its salesmen who were about to take the road for the purpose of selling the spring output of plaintiff's shops. Shinkelman's work upon these samples was, according to plaintiff's testimony, unsatisfactory, and plaintiff therefore insisted that he be put to work at the making of ordinary stock garments and that he discontinue his work upon either samples or duplicates. The local of which Shinkelman was a member refused, however, to permit this, and a resolution was passed at a meeting held on Wednesday evening, November 12th, 1913, requiring that Shinkelman be continued at work upon either samples or duplicates, and forbidding his employment by plaintiff in any other capacity. On the following day a meeting was held between the officers of the plaintiff company and Messrs. Nicholas Klein, attorney for the International Ladies' Garment Workers Union, and Harry Berkowitz, business agent of the several locals. This meeting might have resulted in the amicable settlement of the dispute had it not been for the actions of Berkowitz, who applied some rather unparliamentary epithets to the president of plaintiff company, as a result of which the meeting was unceremoniously adjourned.

On the following afternoon, plaintiff's employees were advised to take their tools with them, because there would be no further work for them unless the resolution theretofore passed was rescinded, so that Shinkelman might be employed upon stock garments. The employees did not, however, remove their tools, for they apparently expected an adjustment of the dispute.

On that evening at a meeting of the joint board, which consisted of five representatives from each of the four locals, the resolution passed by Shinkelman's local was disapproved, and another resolution was passed permitting the employment of

Shinkelman upon stock garments, in accordance with plaintiff's requirement. It was left to Berkowitz to communicate the latter resolution to plaintiff, and upon the following Monday Mr. Klein informed plaintiff that at noon on Tuesday a conference would be held at plaintiff's place of business. On Tuesday morning, however, before this conference was to have taken place, Berkowitz gave orders to the Roberts Sign Company for the making of a banner bearing the following inscription: "*Fulworth Garment Company have locked out their employees. Lady garment workers stay away*"; and about noon, when the conference was to have been held, this banner was placed upon the street in front of plaintiff's business and Berkowitz failed to appear for the conference.

Plaintiff immediately made arrangements to secure non-union help, and employed a number of men and women who were not members of any of the locals. Immediately the former union employees of plaintiff and numerous sympathizers, practically all of whom were members of the local branches of the International Union, began to do picket duty upon the sidewalk in front of the entrance to plaintiff's building, and endeavored by persuasion and threats to induce these employees to leave plaintiff's service and join forces with them. In many instances where they were unable to reach the employees as they left plaintiff's premises, they followed them to their places of residence, or sent committees to wait upon them, and offered them various sums of money to quit plaintiff's employment, and in several instances threatened them with bodily harm unless they acceded to these demands. Police were stationed at the place to preserve order, and guards were employed by plaintiff to protect its property and its employees, with the result that frequent encounters took place between the police and the pickets, the street and sidewalk were frequently filled with disorderly gatherings, and pedestrians were prevented from passing plaintiff's place of business. Various employees of plaintiff were attacked by the strikers and their sympathizers, and in several instances serious injury was inflicted upon them.

Plaintiff now seeks to enjoin the carrying of the banner, the placing of pickets in front of its place of business, the intimidat-

tion of employees, and all other acts which interfere with the carrying on of its business in the usual manner.

As for the banner to which reference has been made, defendants have voluntarily withdrawn this from before plaintiff's place of business, so that we need not further consider the propriety of displaying it. We must, therefore, direct our attention to the power which courts of equity have in a case such as this to restrain the other acts of which plaintiff complains.

We believe that certain principles, applicable to such cases as the one before us, have been well established by a long line of decisions, concurrent almost with the existence of labor unions, and it may be well for us first to enumerate some of these principles as guides in the consideration of the questions presented for our determination.

(1). The right of workmen to combine for the purpose of raising their wages, elevating their social condition, and otherwise benefitting themselves, is undeniable. It is true that the early English cases denied the right of workmen to combine for such purposes. Numerous statutes were passed, beginning with the "Statute of Labourers," enacted in 1349-1350, for the express purpose of preventing such combinations and checking the rise in wages. A combination of two or more persons for the purpose of enforcing their demands for higher wages was deemed a criminal conspiracy and was made punishable as such. All these early English statutes prohibiting such combinations were repealed by the Act of 6 Geo. IV, c. 129 (1825), and the statutory prohibitions were confined to endeavors by force, threats, intimidation, molestation, or obstruction to affect wages or hours.

In America the early English rule has been unrecognized, except in several early decisions in New York and Pennsylvania which have long since been repudiated, and it is now well settled that workmen may combine and associate themselves together for the purpose of bettering their financial or social condition by legitimate and fair means.

(2). Unless restrained by contractual relations, workmen may, for the purpose of gaining legitimate advantages, either economic or social, agree to, and quit work in a body, provided such action is unattended by violence, destruction of property,

or other interference with the rights of employers. To require an individual, or a group of individuals to work for one in whose employment they do not desire to remain would be tantamount to the restoration of slavery or serfdom. There can, therefore, be no doubt that one who is in the employ of another under a contract terminable at will, has a right to discontinue his service at any time, however capricious his motives may be. And when the individuals have combined for the purpose of concerted action, the combination of workmen have the same right as the individual, so long as they have no unlawful object in view, and are not actuated by a malicious intention to injure an individual or the public without just cause. The employees who are members of such organization have a right to refuse to work with non-members, so long as they do not interfere with the property rights of the employer. *National Protective Association v. Cumming*, 170 N. Y., 315; *Waddy v. Typographical Union*, 105 Va., 188; *Printing Co. v. Cassidy*, 63 N. J. Eq., 759.

(3). The rights just enumerated are reciprocal, so that the employer may discharge any or all of his employees whose contracts of employment are terminable at will, and the court will not inquire into the reasons for his action.

(4). The employer has the right to determine in what manner his work shall be done, without interference by others, and has the right to employ such men as he sees fit and, as a condition of such employment, to determine the kind of work which each employee shall be required to do. If the employee does not desire to do such work as may be assigned to him, he may terminate his employment; but neither he nor any one else may stipulate to the employer that an employee shall be permitted to do such work as he chooses, regardless of the employer's wishes.

(5). If employees terminate the relationship between themselves and their employer, as a result of either a strike or a lockout, they can no longer be said to be employees. The positions which they formerly occupied are vacated, and if they again enter into the service of the employer, it must be as the result of a new agreement. It follows that those who are employed subsequently to take the places vacated by them can not

1914.]

Fulworth Co. v. Garment Workers.

be said to occupy any positions to which the former employees are legally entitled, and can not be interfered with by them in their occupancy of such positions.

(6). The employer can not be compelled to take any of the former employees back into his service, nor can the employees be required again to enter into the service of the employer. By exercising their right to terminate their relationship they have mutually surrendered their rights to require the other to resume the relationship.

(7). The employer has a right to secure the services of others, either under agreement for definite periods of service, or under agreement terminable at will, to take places formerly occupied by those who struck or are barred by a lockout; and the latter need not be consulted concerning, and have no right to object to, such employment.

(8). The former employees have a right to use such means to render a strike effective as are not in themselves unlawful or inconsistent with the rights of others. To that end they may support their contest by argument, persuasion, or entreaty, even if the result of the use of such means is ultimately to succeed in persuading all available laborers to support the strike, and thus to secure a monopoly of the labor market. They have the right to meet the new employees, so long as the latter are willing to be approached, and to discuss with them the questions involved, and to persuade them, if they can, to leave their new employment, provided that in so doing they violate no property rights and induce no breaches of contract.

(9). The use of force, violence, or intimidation to attain the ends of the strikers is under no circumstances permissible, however lawful the strike may be, and it is immaterial that the workmen who have replaced the strikers are not bound by contract to enter into or continue in the employer's service. The new employees have the right to come and go when and as they please, without fear of molestation, and to work for whom they please and for such sums as they think proper, without being compelled to discuss these or other questions and without being terrorized or intimidated. The right heretofore mentioned to quit employment at will connotes the right to

retain employment at will, and any interference with the latter right is necessarily an invasion of the privilege for which the striking workman is himself contending.

(10). The stationing of persons near the premises of the employer, commonly known as "picketing," is permissible so long as it is done for the mere purpose of observing what is going on and obtaining such information as a striking workman may be entitled to, or for the purpose of endeavoring to persuade, by orderly and peaceful methods, those who are willing to listen; but the keeping of patrols in front of, or about the premises of the employer, accompanied by disorder or violence, or any manner of coercion to prevent others from entering into or remaining in his service, or the approaching of those who do not desire to confer with them, is unlawful. The streets are for public use; and as he is one of the public, the new employee has the right to go back and forth freely, without being harassed by arguments, and without being subjected to force, threats, intimidation or insulting language. Picketing need not be accompanied by force to be unlawful. If it be conducted merely with the design to hinder or obstruct the new employees or others, or to convey the idea that compliance with the strikers' request will be advisable, or if it be calculated to intimidate the weak and fearful, it is as much unlawful as though it were accompanied by physical force. And so if the purpose of maintaining a picket is to procure workmen to break contracts of employment, it will be unlawful even though conducted in a peaceable manner.

We may now proceed to examine the evidence, and ascertain whether or not any of the preceding principles have been violated.

Counsel for defendants first of all contend that inasmuch as the evidence indicates that the police force of the city is competent to deal with the situation, and that various alleged law-breakers have been arrested and brought before the proper tribunal, this court has no jurisdiction in the case because of the rule that equity will not enjoin the commission of an offense. We fear that this is a *non sequitur*. The mere fact that an unlawful act may be accompanied by a breach of the criminal law

1914.]

Fulworth Co. v. Garment Workers.

and thus render the offender amenable to its penalties, does not necessarily deprive a court of equity of jurisdiction. It is true that there must be something more than a mere threat to commit an offense against the criminal law to induce a court of equity to intervene. It is true also that even though there be an actual breach of the criminal law, or numerous such offenses, a court of equity has no criminal jurisdiction. But when there is an interference, either actual or potential, with property rights, and where the continuance of such interference will result in irreparable damage or a multiplicity of suits, a court of equity will intervene, and its jurisdiction is not destroyed by the fact that the offenses are violations of the criminal law. The existence of the right to exercise force for the purpose of terminating the unlawful acts is not inconsistent with the right to appeal to the Courts for a judicial determination of the matters in dispute. The complaint against this assumption of equitable power comes from no one except those who are inclined to violate the law. *In re Debs*, 158 U. S., 564, 593; *Union Pacific Railway Co. v. Ruef*, 120 Fed., 102, 108, 109, 125.

It is further argued by Counsel for the defendants that the number of pickets before plaintiff's place of business was never "in excess of the number necessary to perform the service required of them in picketing the place of business of their former employer," and as the testimony of those responsible for their actions indicated that they invariably counselled peace and gentlemanly conduct, they can not be held responsible for any violence or disorder.

This argument also appears to us to be absolutely illogical. We have already indicated that picketing, in and of itself, when properly conducted, is not unlawful; but if it is conducted in an improper manner or attended with violence or disorder, or if its inevitable effect is to interfere with the rights of others, it is absolutely unlawful; and the number of those involved or the advice given them by others can in no wise affect the case. The testimony indicated that there were various scenes of disorder, and that on one occasion twenty-two persons were arrested at about 5.30 P. M., in front of plaintiff's place of business and that twenty of these were pickets. On

another occasion a struggle arose at the same place, in which no less than sixteen pickets were implicated and "black jacks," "brass knucks" and an ammonia gun were displayed. It surely can not be contended that the presence of sixteen or twenty pickets on a sidewalk less than ten feet in width, and in front of an entrance to a building which does not exceed six feet in width can possibly be necessary, particularly in view of the fact that only twelve people were then working for plaintiff. Race street is one of the busiest retail thoroughfares in this city, and that portion of the street in the neighborhood of plaintiff's shop, particularly during the holiday season, is traversed by thousands of people each day. The presence of numerous pickets, therefore, must of necessity impede traffic and interfere with the rights of others to pass without annoyance; and when the presence of a large number of pickets is invariably attended with disorder or violence, the court's duty must be manifest. Indeed the number of pickets is immaterial; for if their purpose is unlawful, picketing is illegal whether there be one or many (*Eddy on Combinations*, Section 539). It is not the obstruction of the highway with which the court is concerned so much as the offenses which have attended upon the gathering of pickets in this case. Although it may be true that those in authority advised the pickets against resorting to violence, yet there is no evidence of any action on the part of any individual or organization looking toward the disciplining or punishing of those who disregarded this advice. Immunity can not be secured by merely showing that the officers of the several organization advised their members to conform with the law.

In this connection we desire to call attention to the testimony concerning the employment of Mrs. Artie Belle Martz by Berkowitz, the business agent of the several locals, to act as his personal representative in connection with this strike or lockout. She secured employment in plaintiff's shop ostensibly as a non-union tailoress but in reality she was a member of the union and was acting admittedly (and we now use a word authorized by Berwkowitz himself) as a "spy." Berkowitz testified that her duty was to procure information concerning the place of residence of the various employees, so that efforts

1914.]

Fulworth Co. v. Garment Workers.

might be made to see them at their homes and induce them to withdraw from plaintiff's service. In three instances she admittedly made appointments with employees; and it seems to be more than a mere coincidence that in each case the employee with whom she made the appointment was subsequently attacked and subjected to violence. One of these was a woman, Mary Shearer, and she was injured so that the attendance of a physician was necessitated. The other two employees, Caplan and Topper, were also badly beaten. It may also be remarked in passing that the pretense upon which she met these employees was different in each case. It must be said in justice to the locals and to their members, that this woman was employed by Berkowitz without their knowledge or consent, and that when the fact of her employment was brought to their attention, they condemned his action and refused to sanction the payment for her services. Surely counsel for defendants can not seriously contend that the attacks upon these employees were entirely unconnected with the fact of their employment, or with the fact that a strike was in progress. The visit of a numerous committee to the house of Morris Harris in his absence for the purpose of informing his wife that unless he terminated his employment forthwith he might suffer permanent injury, and the visit of a committee to the residence of Louis Brown, and the subsequent threat to hide that committee in the attic of his residence for the purpose of attacking him, and the attack upon the president of the plaintiff company by three of the union men and members of their families at the Grand Central Station to which he had gone to meet a relative who was to arrive in the city, must likewise be viewed as illegal attempts to carry out the purposes of defendants.

It is further suggested that the Court has no right to interfere because there is no evidence that defendants entered upon plaintiff's property. This suggestion arises out of a misconception of the property rights which courts of equity may protect.

"A person's business is his property and he is entitled to protection from unlawful interference therewith. Every person has a right to carry on his legal business according to his own

discretion, and to employ therein any means which are safe, healthful and lawful, and to employ such persons as he may select; and it is the duty of all other persons to refrain from obstructing any party in the exercise of these rights." 1 *Eddy on Combinations*, Section 542. See also *Mulholland v. Waiters' Union*, 13 O. D. (N. P.), 342, 359.

A person may also be said to have a property right in his contracts, and is entitled to protection against any unlawful interference with these contracts, particularly where the remedy at law would be inadequate. In the case at bar, the testimony indicates that that plaintiff was compelled to enter into contracts with various new employees in order to secure their services, which contracts are to run from three months to one year. It is generally held, as heretofore indicated, that an attempt to procure a breach of contract of employment is unlawful, whether the attempt made by an individual or a combination of individuals, and a court of equity will enjoin such interference; and it is no justification that defendants acted in good faith, in the pursuance of their general purpose to promote their own welfare, and without knowledge of the existence of the agreement. Defendant Berkowitz admits that he authorized his representatives to offer various sums of money to various employees to induce them to quit their employment, and this and the other actions complained of, in so far as they affect contractual rights, are undoubtedly improper. *Martin on Labor Unions*, Sec. 209.

It is apparent from the foregoing considerations that plaintiff is entitled to an injunction restraining defendants from those acts, which, as has heretofore been indicated, are unlawful and are a proper subject for equity jurisdiction. We come now to consider the extent of such injunction as to the parties involved. Counsel for plaintiff has directed our attention to numerous cases which hold that the entire membership of the various locals may be enjoined through defendants as their representatives, particularly through Berkowitz, who was their agent in all that he did. Counsel further contends that the injunction may issue against an unincorporated labor union, and thus all the individual members may also be reached. Special reliance is placed upon the case of *Hillenbrand v. Building Trades Coun-*

1914.]

Fulworth Co. v. Garment Workers.

cil, 14 O. D. (N. P.), 628, which was decided in this Court in February, 1904. We regret to say that we find ourselves differing from the learned judge who decided that case, not so much as to the law which is therein expressed, as with the practical results which must necessarily follow the rule which he adopted. An action for an injunction is a proceeding *in personam*, and we do not believe that the court has the moral right to lay its restraining hand upon one who may never have heard of the controversy which is before the court, who may never have participated in the acts which are the object of its animadversion, and who has had no opportunity to defend himself against the imputation which would thus be made to rest upon him. In short, we are unalterably opposed to the theory of "blanket injunctions," particularly where such course is, as in this case, unnecessary. Plaintiff has in its possession, and has carried into the record, a list of all the members of the several locals, and it will be entirely possible for it to make any or all of them parties to this proceeding. While it is true that at the time when the petition was filed, most of the members of these Locals were unknown to plaintiff, the information has since been furnished to plaintiff, and our ruling will therefore work no hardship upon it. It is true that many of the members of the locals were present during the trial of the case, and when, after argument, the court expressed its view substantially as herein set forth. (Indeed, the evidence would indicate that various members of the locals and various sympathizers who were not members, were instructed by Berkowitz to give up their work during the trial of this case and to appear at the court each day, for a purpose which was entirely too apparent to escape our notice.) Of course, these men and women who are aware of the injunction will necessarily be controlled thereby, and they will not violate the writ except at their peril, but the injunction will actually issue only as to those who are made parties defendant and plaintiff will have leave at any time before the final hearing by proper entry to make such other parties defendants as it may see fit.

We might suggest before closing, that had it not been for the actions of Berkowitz, this difficulty would never have arisen,

and the court would never have been asked to interfere. The evidence clearly indicates that every controversy between the employer and its employees was ultimately satisfactorily adjusted by the local which was involved. Even in this case the joint board, by its action in overruling the resolution of Local No. 98, complied with the demands of plaintiff, so that there was absolutely no necessity for either a strike or a lockout. Had the result of this action been communicated to plaintiff, the controversy would have ended at that point; but such simple action would not, apparently, have served the purpose of Berkowitz, so that he, whose duty it was to communicate the information, failed to do so, called the strike and stationed the pickets at plaintiff's place of business. We believe that a decree enjoining Berkowitz from the doing of those things which are improper and unlawful will practically terminate the controversy, joining Berkowitz from the doing of those things which are improper for all parties except himself are in a conciliatory frame of mind.

A decree will therefore be entered for complainant as follows:

It is ordered, adjudged and decreed that each of the defendants be, and they are hereby ordered, and commanded to desist and refrain from collecting and attempting to collect in crowds in the street or upon the sidewalk at or near plaintiff's premises located at Nos. 411-413 Race street, in Cincinnati, Ohio, and from entering or attempting to enter plaintiff's said premises for the purpose of interfering with the free use and occupation by the plaintiff of any and all of its property or premises of any kind and character; from compelling or inducing or attempting to compel or induce, by threats, intimidation, force and violence, any of the employees of plaintiff to refuse or fail to perform their duties as such employees; from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, any of the employees of plaintiff to leave its service; from preventing or attempting to prevent, any person or persons, by threats, intimidation, force or violence, from entering the service of plaintiff; from preventing, by violence or any manner of intimidation, any person or persons from going to or upon the premises of complainant for any lawful purpose whatever, or from aiding, assisting, abetting or counselling any person or persons to commit any or either of the acts aforesaid; from attacking, assaulting, threatening, intimidating, or using abusive language toward any of the employees of plaintiff at any place within the City of Cincinnati; from going either

1914.]

In re Petition.

singly or collectively, to the homes of complainant's employees, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of the plaintiff, or from entering plaintiff's employ, as well as from intimidating or threatening in any manner the wives and families of said employees for the purpose of preventing such employees from remaining in the service of plaintiff; from doing any act whatever in furtherance of any purpose to restrain plaintiff or its employees in the free and unhindered control of its business; from inducing or endeavoring to induce by threats, intimidation, or any other method, anyone to violate any contract with plaintiff, and from counselling, advising, aiding or abetting any or either of the acts aforesaid.

In conclusion we quote the language of the Circuit Court of the United States in the case of *Union Pacific Railway Company v. Ruef*, *supra*:

"It is impossible, as well as impracticable, for the court in addition to specify all the acts and things which shall or may constitute intimidation or coercion. This must be left to the wisdom and intelligence of respondents. Any violation of the order will, however, be done at the party's peril."

MAKING A RESIDENCE DISTRICT "DRY" BY PETITION.

Common Pleas Court of Cuyahoga County.

IN RE PETITION TO PROHIBIT THE SALE OF INTOXICATING LIQUORS AS A BEVERAGE IN A CERTAIN RESIDENCE DISTRICT IN A MUNICIPAL CORPORATION.

Decided, December 1, 1913.

Intoxicating Liquors—Local Option in Residence Districts in Municipal Corporations—Making Territory "Dry" by Petition—Technical Irregularities—Description and Map of the Territory Proposed—Sections 6140 et seq.

1. Where a petition to prohibit the sale of intoxicating liquors in a clearly residence district within a municipality, signed by a majority of the legal voters of such district, is declared insufficient because of errors or irregularities of a technical character, another petition covering the same and additional contiguous territory

may be filed without waiting until two years have elapsed; and it is probable that a second petition could be filed at any time during the two year period in a case where the first petition was declared insufficient for lack of the requisite number of legal signatures.

2. If a petition appears on its face to contain the requisite number of legal signatures, the *prima facie* thus afforded of its sufficiency in that respect must be rebutted or overcome by the contestants or objection thereto on that ground will not lie.
3. The territory included in the petition must be accurately described by existing well known lines or by lines which can be easily ascertained, in order that criminal jurisdiction may be established in the event the petition is declared sufficient; but the map need not be mathematically accurate and is not open to objection if it shows substantially the territory covered and the saloons to be affected should the district be declared "dry."
4. The word "block" as used in Section 6069, General Code, means "the territory bounded by four well recognized adjacent streets in a residence district," and where it is shown that one of the streets which it is claimed bounds a block has been abandoned, objection does not lie.

Charles M. Earhart, for petitioners.

C. L. Shaw, contra.

FORAN, J.

This is a petition to prohibit the sale of intoxicating liquors in a certain residential district in the city of Cleveland. An answer has been filed by the contestants, setting up five separate and distinct defenses. Under a recent decision of our Supreme Court, this case is the same as any other action in court, and a reply should be filed to this answer by the petitioners if they desire to make a traversable issue. Leave to file such a reply will be granted.

During argument it was claimed by counsel for the contestants that local option laws of Ohio are confiscatory in their nature, and should be strictly construed against petitioners. The petitioners, on the other hand, claim that saloons, especially disorderly saloons, are confiscatory so far as residence property is concerned. The tendency in all cities is to segregate business in centers, away from residence property; and if one of these business centers grows up where it is surrounded by residence

1914.]

In re Petition.

property, that property, for residence purposes, is necessarily depreciated in value, and for the evident reason that citizens naturally desire to avoid the noise and confusion incident to business centers. It may be said generally that business of any kind, to some extent depreciates residence property, in its immediate vicinity, for residence purposes. We think a saloon, or the traffic in intoxicating liquors, is a business the same as any other kind of commercial enterprise, and should conform to the general tendency and be segregated in the business centers, and should not be, ordinarily, permitted in strictly residence districts.

The contestants in this case claim, first, that the petition should be held insufficient, for the reason that the territory covered by the petition now before the court was included in a petition which was held insufficient by a judge of this court April 16, 1913; the contention being, that after a petition to prohibit the sale of intoxicating liquors has been held insufficient by a judge or a mayor, another petition to prohibit such sale in the same territory can not be again filed until after the lapse of two years.

It is quite clear that when a petition to prohibit the sale of intoxicating liquors in a residence district is for the first time filed, and at that time is held by the court or mayor to be sufficient, a petition to permit the sale of intoxicating liquors in the same district can not be filed until after the lapse of at least two years.

Section 6142, General Code, is clear and explicit upon this point. If a petition to prohibit the sale is held sufficient, the territory or district remains dry for two years, and therefore until a petition to permit the sale of intoxicating liquors in such district has been held sufficient, and if so held sufficient, the district or territory then remains wet for two years, when another petition to prohibit the sale may be filed.

Section 6160, General Code, is equally clear and explicit upon this point. There can be no question but that, after a petition has been held sufficient, whether it be to prohibit or permit the sale of intoxicating liquors, the status established by holding the petition sufficient remains in any event for two years, and

can not be disturbed during that period. The only exception to this clearly-defined policy of the law is that which is provided for by Section 6156, General Code, which provides that in a district where no saloons or places where intoxicating liquors exist, but in which the sale of such liquors has been prohibited by the presentation of a petition which has been held sufficient, or in a kind of district with which we are not here concerned, in such a case a petition may be filed within two years covering part or all of the territory contained in the petition first filed and held sufficient, with or without other contiguous territory.

We are not concerned with the reasons for the enactment of this section, but it will be noticed that even the exception relates to territory where a petition to prohibit has been held sufficient. The prohibition to file within two years always relates to a district or territory where and in which or concerning which a prior or former petition was held sufficient. The policy of the law is to afford citizens of residential districts an opportunity to prohibit the sale of intoxicating liquors in such districts, if they see fit for any reason to do so. Those opposed to such sale must take the initiative in all local option proceedings, whether it be by election or by petition. But as all city territory is constantly changing both with respect to the character of the population and the nature and purpose for which a given territory may be used, the law gives those in favor of the sale of intoxicating liquors an equal opportunity to be heard after two years in a district where its sale has been prohibited; that is, if the character of the district has changed, and has become to a large extent a business section, or if the population has changed in character, an opportunity is presented to the people of such district, after it has been held dry for two years, to again change its status if a majority of the district or the legal voters of the district see fit to do so. If a majority of the citizens of a residence district, as shown by the last general election, file a petition to prevent or prohibit the sale of intoxicating liquors in the district, and the petition is held insufficient, the law does not prevent or forbid them from filing another petition for that purpose within two years. In this respect we think that in declaring a residence district dry by a petition, and by election,

1914.]

In re Petition.

there is a difference. An election involves a large expense, which must be borne by the municipality itself. A large portion of the expense involved in declaring a district dry by petition is borne by the petitioners; and, besides, the formalities and procedure are entirely different. Holding a petition insufficient for reasons other than failure to have the requisite number of legal signatures, seems to be at variance with the general scope and purpose of the law. It is an exception which was undoubtedly grafted upon the law in the interest of those who are opposed to prohibiting the sale of intoxicating liquors in such districts.

Section 6141, General Code, in effect provides, that if the mayor or judge holds that a majority of the legal voters of the district signed the petition, it shall be *prima facie* evidence that the sale is prohibited in such district; and to the same effect is Section 6143, General Code. By Section 6164, General Code, it is provided that error from the decision of the mayor or judge can not be prosecuted to the court of appeals unless the petition has been declared and held sufficient. It is clear, therefore, to the court that the manifest intendment of the statute is to confine the prohibition to file a petition within two years to those cases in which a petition has been held sufficient. It would be a manifest injustice to the citizens of a residence district to prohibit them or prevent them from filing a second petition within two years if the first petition was held insufficient because of some technical or clerical irregularity in the description of the district, or location of the saloons therein, or character of the map attached to the petition, or because the court held they had included a business block in the territory described. Surely citizens of a residence district ought to be permitted, in such case, to file another petition correcting the clerical errors or irregularities complained of. If the district is clearly residential in character, and if a majority of the legal voters therein have signed the petition, and it is declared insufficient because of errors, irregularities or mistakes of the kind indicated, they may file another petition covering or including the same and additional contiguous territory at any time after the petition has been so held insufficient for such reasons; and we are not pre-

pared to say they may not do so even if the petition is declared insufficient for want of the requisite number of legal signatures.

It would be strange indeed to find a petition to either prohibit or permit the sale of intoxicating liquors in a residence district to which a mere technical objection might not be interposed; and, no matter how immaterial such objection might be, a very plausible argument might be made in support of it, plausible and cogent enough, at least, to satisfy and ease the elastic conscience of some purely political official; and where a petition of this kind has been held insufficient on the ground of some technicality, irregularity or mistake, to hold another petition could not be filed for two years would render the law nugatory and void. In other words, it would be tantamount to holding that a judge or mayor could by judicial construction repeal a legislative enactment, for it might be impossible for practically all the legal voters of a residence district to ever prohibit the sale of intoxicating liquors therein.

The first objection will, therefore, be overruled.

The second defense or objection challenges the jurisdiction of the court, for the reason that the hearing was not had within forty days from the filing of the petition.

For reasons appearing in the record, and to which it is not necessary to refer, and because of former holdings by our courts upon this question, this objection will be overruled.

The third defense or objection is, that the petition does not contain the number of *bona fide* signatures required by law.

There is no legal evidence before the court to support this contention. The petition on its face shows *prima facie* such requisite number of signatures; and this *prima facie* evidence has not been rebutted or overcome by the contestants; therefore this objection will be overruled.

The fourth defense is, that the map attached to the petition is incorrect, and is not in conformity to law.

The evidence conclusively shows that the territory or district named in the petition is described by clearly defined lines accurately transcribed from the official surveys and official maps of the county and the official ordinances of East Cleveland, Collinwood and the city of Cleveland. At least, no evidence has

1914.]

In re Petition.

been introduced to show that these lines are not strictly accurate and correct. It is important that the territory described in the petition be accurately described by existing well known lines or lines which can be easily ascertained, as this affects the venue and criminal jurisdiction in case a petition to prohibit the sale of intoxicating liquors is held to be sufficient. No fault is found with the written description contained in the petition as to the boundary lines thereof, but it is insisted that this written description of the boundary lines of the district does not agree with the map, or, rather, that the map attached to the petition does not conform to the written description. We think this unimportant. Section 6146, General Code, provides that the petition shall have a map or drawing attached, showing the outlines of the district and location of all saloons within the district. The purpose of this section is evidently to enable the signers to whom the petition is presented to see and know what territory and what saloons may be affected by their action in signing the petition. The map need not be mathematically accurate. If it shows substantially the territory affected, and shows all the saloons to be affected should the petition be held sufficient, the map will be held sufficient. The Century Dictionary defines outline as "a rough draft or first general sketch of the main features of some scheme or design the details of which can be filled in later if need be; a description of the principal features only." We think the map fulfills these requirements, and this objection will be overruled.

The fifth and last defense is, that the proposed district contains a block, as that term is defined in the statute.

The word "block," as defined by Section 6069, General Code, means "the territory bounded by four well recognized adjacent streets in a residence district."

The evidence does not show that the block in question is so bounded or enclosed. The evidence shows that a portion of Casper avenue, one of the streets which it is claimed bounds this block, has been abandoned. On a part of one side of the alleged block there is no well-recognized and adjacent street. Therefore the objection is not well taken, as the block, to comply with the statute, must be enclosed, that is, completely surrounded by four well-recognized adjacent streets.

We might stop here, but it seems some confusion has arisen as to what is meant by the language defining a block. The words, "a city block," are so well and so generally understood to mean a square or rectangular connected mass of buildings enclosed by four streets, that it would seem superfluous to undertake to further define the term. The words furnish their own definition. If one were to ask a ten-year old city boy what the word block means, he would smile at your simplicity, for he has been "around the block" so often that it would seem trite to ask him what the word means.

The block exception was grafted upon the local option statutes at the instance and for the benefit of those opposed to prohibiting the sale of intoxicating liquors in a residence district; and the smaller the block the better it suited their purpose, for they would have less foot frontage of commerce and business occupancy to provide or account for. It might be difficult to find on a large area of territory bounded by avenues and streets a foot frontage of a connected mass of buildings sufficient to bring them within the exception.

An octagon or hexagon block, or an irregular salamander shaped block is rarely found in modern cities. The word "bounded," as used in this statute, means enclosed. If there are five or six adjacent streets around a connected mass of buildings, how can they be said to be enclosed by four of them, that is, completely enclosed? It would take all the streets to enclose the connected mass of buildings. Suppose a connected mass of buildings is surrounded, bounded or enclosed by streets known as A, B, C, D, E and F. Can it be said the buildings are completely enclosed by any four of these streets? If it be said that the greater number includes the lesser number, and that hence these six streets include four streets, it may be asked, which of the four streets included in the six completely enclose the block? And when this question is asked, the fallacy of the reasoning becomes apparent at once. When we say Ohio is bounded by the Ohio river, Lake Erie and the territory of the other states, we mean the state is completely enclosed by the waters and the lands mentioned. If the law provided that townships, in a newly settled or open country, should be bounded by four lines, that is,

1914.]

In re Petition.

that they should be either square or rectangular, would a township having six sides, or one bounded by six lines, be a compliance with the law? There is no question here of legislative intent. The meaning of the words "bounded by four well-recognized adjacent streets" is as plain as simple English words can make it. The language does not call for judicial construction. If the language of a statute is plain and free from ambiguity, and expresses a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be given the construction the words used mean in their ordinary sense (*Black on Interpretation of Laws*, 35, 36). This rule of construction is everywhere followed by our courts, and it is the rule of construction which the court applies in this case. The province of construction is to ascertain and give effect to the intention of the Legislature, but this intent must be derived from the legislation and language used, and may not be invented by the court 82 O. S., 376, 380). If the intention can be ascertained from a reading of the statute, then such intention must be ascertained from the reading of the statute itself. If it were really necessary to inquire what the Legislature meant by the word block, it would be sufficient to say that it meant just what the words actually mean as understood generally in ordinary speech; but when the Legislature, in addition to the use of the word block, says that the block must be bounded, that is, completely enclosed, by four well-recognized adjacent streets, there is no room or necessity for construction. In the modern city, as has been said, to find a block or connected mass of buildings bounded by more than four adjacent streets would be difficult. Such so-called blocks are rarely found. If the Legislature meant four or more streets, it would have said so. It must be presumed that the members of the Legislature are men of ordinary common sense, and knew what they were doing when they enacted this section of the statute and thus defined what a block meant. Take the phrase "bounded by four well-recognized adjacent streets"; can it be said these words need judicial construction? What right has a court to read into this statute the words "or more" after the word "four"? Legisla-

tion by judicial interpretation or construction means judge or court made law, and is a menace to free institutions. It should not be tolerated; and where the language of a statute is so plain and so simple that it can be understood by any ordinary man, courts have no business to give it a construction that the language itself does not warrant.

I have no doubt but that the holding which will be made in this case is going to work a hardship upon some persons doing business in this district; but if this district contains a well-recognized business center, and I think it does, the contestants will have an opportunity to be heard in two years from now.

I think those who believe that the local option laws involve the prohibition concept are mistaken. The primary object of the legislation was to exclude saloons from purely residence districts. In municipalities where there are well-recognized business, manufacturing and commercial centers covering several blocks, or parts of blocks, there is no reason why licensed saloons should not be permitted in such centers, if confined to the business or commercial centers and conducted properly; and if not, the laws are amply sufficient to enforce the orderly operation of the business. The laws respecting this business have been very materially changed by the new Constitution and the recent legislation thereunder, and it is quite probable that local option laws will be amended and made to conform to changed conditions.

The petition is found sufficient.

1914.]

Harrison Co. v. Blacker.

SALE OF REAL ESTATE BY A CORPORATION.

Common Pleas Court of Franklin County.

THE HARRISON COMPANY V. JOHN H. BLACKER ET AL.

Decided, January 26, 1914.

Corporations—Binding Character of Agreement Sanctioned by all the Stockholders for Sale of Realty—Finding as to Whether a Transaction Was a Loan or a Sale Outright—Estoppel.

1. The validity of proceedings in connection with a sale of real estate by a corporation can not be thereafter questioned by the corporation on the ground of insufficient compliance with the statute, where all the stockholders sanctioned the making of the sale at the time it was made and at the price which was received, and the transaction was thereupon effected by the board of directors in accordance with the action of the stockholders.
2. The court finds from the evidence and all the circumstances surrounding the transaction, that the agreement entered into between the parties to this case, involving the Harrison Building in Columbus at a valuation of \$225,000, was a sale of the property, and was not a loan for that amount.

DILLON, J.

The conclusion to which the court has come in this case is that the agreement which John H. Blacker entered into was a purchase and sale of the property, and not for a loan. The court will take up and the salient points which have been raised in this case and discuss them as briefly as possible.

The claim is made on the part of the plaintiff that no proceedings were had to comply with the statute authorizing a company to sell all its assets, and that Sections 8710 *et seq.*, were not complied with. The essential part of these statutes is that it requires a preliminary vote of three-fourths of the directors, and then that such proposition shall be submitted to the stockholders, at a meeting called for that purpose. The other provisions of the statute simply furnish protection to the directors and stockholders who may not have notice, etc. In the case at bar, the meeting authorizing the transfer contained every stockholder and every director, the two sets being the

same, and the resolution recites the fact that all were present. For two very good reasons, therefore, the deed as such is legal; first, because all the stockholders and directors agreed, and there was a sufficient compliance with the statute thereby; and, secondly, the parties are now estopped to deny their own act.

The fact that the resolution originally provided for a deed to Blacker as trustee, is strongly urged as a potent indication that the transaction was that of a mortgage. The argument on behalf of the plaintiff is that this word "trustee" referred to him as a trustee for the Harrison Company; and that there was no intention to put the title directly in him. Aside from the oral evidence adduced on this subject, the other part of the resolution, contract and deed, are wholly inconsistent with any such theory, as will be mentioned later. But the explanation of Mr. Blacker, as well as some of the correspondence in the case, very satisfactorily explained the theory which caused the word "trustee" to be first written and later expunged. The fact that Blacker had one or more other persons interested with him in furnishing the money for this deal, was known to all the parties, both before the transaction occurred and subsequently. The exchange of letters between Mr. Lentz and Mr. Blacker, later on in the year, also shows that there was a clear understanding as to this.

Reference is here made to exhibits Nos. 103, 104 and 105, covering a period in the latter part of November and extending into the early part of December, 1911. The theory that this expression, Blacker "trustee," referred to him as a trustee for the Harrison Company, or for himself and the Harrison Company, can not be sustained from any view point of the evidence upon that subject.

The value of the property has been one of the big features of this case, and it, of course, plays an important part in any case where a deed, absolute on its face, is sought to be declared a mortgage. Not having any reference to the number of witnesses, but to the weight of the evidence offered upon this subject, the overwhelming weight of the evidence is to the effect that this property at the time of the deed was not worth to

1914.]

Harrison Co. v. Blacker.

exceed \$225,000. First, take the names of the witnesses themselves, Mr. Burdell, Mr. Deshler, Mr. Spahr, Mr. Cooke, Mr. Hardy. In no community of an equal size of the city of Columbus, could a list of persons be found whose testimony could be of greater weight than that of these men. They are men of the highest integrity; men of unquestionably sound judgment and experience, and some of them own office buildings themselves. Mr. Burdell adds to his evidence the fact that upon one occasion they offered to sell him this building for \$225,000 with a three year option to repurchase for \$240,000, but that he would not offer over \$200,000. But aside from the judgment or estimate given by the various witnesses, the most convincing proof is that of the method to determine the value of an office building as laid down by the witnesses, having reference to its gross income, gross expenses, and net earnings, and that part of the evidence which explains how the average life of an office building is shorter than that of an ordinary building, because being located in the central part of a large and growing city, it must keep pace with the improvements that will be demanded by renters twenty years from now. If we would figure, therefore that the life of this building would be thirty-three years, it is quite manifest that in ascertaining what per cent. of profit is being made on the building, there must be a charge off of three per cent. a year. It was suggested at the trial that this was not a fair basis at all because the owner is not supposed to have the principal at the end of the life of the building, but this is not tenable. The testimony is that they all do that in figuring the net income. The way the net profit was figured on the part of the plaintiff, would simply result in the company robbing itself of about three per cent. every year, taking it out of the principal and counting it as interest. The situation is no different from that in which a man might loan \$100,000 for ten years at the rate of four per cent. He might have the debtor pay him the four per cent. and then pay him three per cent. on the principal each year and imagine he was getting seven per cent. instead of four. In other words, at the end of the ten year term, the lender would be entitled to receive his entire \$100,000 back again.

Another fact that stands prominent in this case is that there was absolutely no reason why the corporation should not have recited the true facts in the resolution. The only reason urged was that they did not want the public to know that they were thus involved. In this connection, permit me to animadvert to a part of the discussion in the briefs, which refers to Mr. Lentz's statement that the making of this deed to Blacker in the form it was made was to make the public believe that it was in the hands of a *bona fide* owner. It was entirely unnecessary for counsel for the plaintiff to explain the meaning which Mr. Lentz had when he used the expression "fool the public." It is a matter of common sense, and good business sense at that, where a large piece of property is heavily involved, and where the field of purchasers is very small, that a possible purchaser should not feel that the company was already being squeezed to death and that he could get it at most any price and at a forced sale.

But recurring now to this alleged reason for not reciting the fact in the resolution and deed, this reason is entirely destroyed when we realize that the agreement to reconvey was put upon record almost immediately. Men in dealing with a large and valuable piece of property such as is involved in this case, would certainly not take any chances as to what the terms were, and especially in so far as their own resolution is concerned, which is private property. And further, if this was simply a loan, it is almost impossible not to believe that the secretary, who was active throughout the entire transaction, would not have had some inkling of it. A corporation is supposed to act through its directors, and while I do not fail to realize that the fictitious entity is not controlling, but that the directors and stockholders themselves in their action may speak for it, that the officers, directors and even stockholders sometimes, under certain circumstances, can control it and act for the corporation, nevertheless we must not lightly treat the solemn and formal action which these directors and stockholders have taken. It is true that there was some talk of a loan between these parties in the summer or early fall of 1910. But it is likewise true that that form of relief never materialized.

1914.]

Harrison Co. v. Blacker.

In referring to the solemn written instruments which have been executed in this case, we must remember that the very basis and soul of the parol evidence rule is the protection of the parties in the agreement which they have made. Where parties, after their various discussions and counter-propositions, have finally sat down and made a sole memorial of their agreement, it is not lightly to be talked away or modified; and we must bear in mind that this applies just as strongly where there are five or six on one side and only one on the other, as where there is only one on each side. In other words, the fact that six men may obligate themselves to pay another man a sum of money or perform some work for another man, does not deprive that one man of his right to see to it that that memorial shall not be talked away, simply because there are more people on the other side. He is clearly entitled at the hands of the law to exactly the same protection as if the same number of people testified on his side as on the other. Otherwise the protection which the law affords by these written memorials would be inequitably administered.

Attention is again called by counsel to the fact that by the terms of the contract executed between Blacker and the Harrison Company in accordance with the resolution of the corporation, it is expressly agreed that "the taxes to be levied for the year 1911, be pro rated up to the time the option is exercised." It is further recited in the resolution of the corporation (Exhibit No. 13), "Resolved that this company sell its property, known as the Harrison Building," etc.; and further, and very significant, in the same resolution is recited, in mentioning the terms, that "John H. Blacker is to assume the mortgage of the Western & Southern Life Insurance Company of \$150,000 with accrued interest thereon, and the second mortgage to Walter R. Martin for the sum of \$25,000 with accrued interest thereon." This makes John H. Blacker the only solvent one of the two parties to the transaction, liable exactly the same as if he had personally signed these obligations, a situation which is wholly inconsistent with a man who would be loaning the sum of \$65,000 or less to the corporation.

Again, in the deed which the company executed to Blacker, in addition to assuming those two obligations, he also agrees and does assume "the taxes for the last half of the year 1910" as part of the consideration, a fact wholly inconsistent with the theory of a mere loan, since the duty of paying these taxes of course, would devolve upon the real owners, and Mr. Blacker would not be making any such agreement if that were the real situation.

Again, a feature which distinguishes this from many of the cases in which a concomitant agreement is made to reconvey, is this, in nearly all these cases the agreement to recovery is for the same amount as the consideration paid or recited in the deed, together with a certain stipulated rate of interest, which very strongly indicates the fact that the deed was intended as a mortgage.

Again, by reference to Exhibits Nos. 103, 104 and 105, heretofore referred to, we find Mr. Blacker writing on November 21, informing Mr. Lentz that he had talked "over with his people the matter of extension of the option on the Harrison Building, but they were not willing to grant any further extension of time other than that called for in the option"; and also the letter winds up with the hope that Mr. Lentz will "get busy and find a buyer." This is answered by Mr. Lentz in his letter of December 2, in which he even suggests to them a new consideration for which they would give Mr. Harrison an additional year, but outside of the use of the word "redeem" with reference to Mr. Harrison, there is nothing in the correspondence which would indicate that the parties were dealing on any other theory at all than that which was expressed in writing between them.

I now come to discuss the question of presumption. At the outset we must remember that the old classifications, and which will be found in the older works with reference to presumption, have been clarified so that the so-called presumptions of fact today are obsolete, as they deserve to be. The old classification divided presumptions into two classes, namely, presumptions of law and presumptions of fact. Then presumptions of law were

1914.]

Harrison Co. v. Blacker.

divided into two classes, those which were disputable as, for instance, the presumption of death where absence has taken place for seven years, and conclusive presumptions, such as that a child under seven years of age is incapable of committing crime. The so-called presumptions of fact are nothing more than logical inferences. That is to say, a set of facts which are so clear and satisfactory that a person could have but one reasonable, logical inference. Nevertheless, it is not the province of a court blindly to assume any particular inference as a matter of law, and the court dare not so charge a jury, where it is purely a matter of so-called presumption of fact. To illustrate my point a little more clearly, we must remember that a presumption is a rule of law which attaches a definite probative value to a given set of facts. Thus, the court will charge the jury that if they find a man has been absent and unheard of for seven years, the jury must find that he is dead whether they think so or not. It does not leave the jury the privilege to go into their room and deliberate as to whether the man is dead. The law has attached a definite probative value to that state of facts, and therefore, the judge instructs the jury that they must find him dead, whether they think so or not. The trouble with the use of the word "presumption" arises, just as we find it in the case of *Marshall v. Stewart*, 17 Ohio, 356. The syllabus in that case, decided in 1848, in substance, is that where land is conveyed by an absolute deed, and the vendee at the same time delivers to the vendor a contract by which he agrees to reconvey the premises by a specified time upon the repayment of the purchase money with interest, the circumstances furnish presumptive evidence that the deed was intended as a mortgage. The expression "presumptive evidence" will not stand strict analysis. It was simply an expression by the court that the facts in the case were such that it would justify a finding that the deed was a mortgage.

Beginning with that case and following the cases through, including the case of *Wilson v. Giddings*, 28 O. S., 554, it can not be maintained that there is any presumption of law upon this subject in Ohio. Each case must of necessity stand upon

its own facts and circumstances. Scarcely any two cases are exactly alike. The unfortunate use of the word "presumption" by judges from time to time has led to some confusion upon the subject. The presumptions of law are well settled and have been well settled for many, many years.

If, as claimed by learned counsel for the plaintiff, a presumption immediately arose upon the introduction in evidence of the two instruments in this case, how strong is that presumption? How weighty is it? How much evidence will it take to balance it? Are we to ignore all the other facts and surrounding circumstances in this case?

The so-called ear marks are not all present in this case. Some of them, such as the vendor's financial embarrassment, are equally present in most genuine deeds and conveyances. It is the wants of people which compel them to bargain and deal. Sitting as a trier of fact upon this particular issue, I feel satisfied that, commencing with the appraisal in the United States Court of \$149,333.33, made in 1906, up to the present date, if we should treat this transaction as a loan and a mortgage for \$215,000, and would then proceed under its terms to enter a decree of foreclosure, at no time would it sell for enough to leave any surplus whatever to go back to the possession of the Harrison Company.

The appeal bond will be fixed at sufficient amount to cover the costs made here and to be made in the upper court. If the parties do not agree upon the amount, the court will fix it before the entry goes on.

1914.]

Green v. Commission.

**VALIDITY OF CIVIL SERVICE LAW IN ITS GENERAL
FEATURES.**

Common Pleas Court of Franklin County.

**DAVID M. GREEN V. THE STATE CIVIL SERVICE COMMISSION OF
THE STATE OF OHIO ET AL.**

Decided, February 16, 1914.

Constitutional Law—Civil Service Act Valid in Its General and Dominant Feature—Delegation of Power in Administrative Matters—State Commission May Investigate a Mayor with Reference to His Conduct in Civil Service Matters—Injunction the Proper Remedy Against Improper Exercise of Power by a Public Official.

1. Injunction is the proper remedy against a public officer who assumes or threatens to exercise power not conferred upon him by law or conferred by an invalid statute, where such action will result in serious injury to a private citizen.
2. Power is conferred upon the state civil service commission to investigate the mayor of a city with reference to the enforcement by him of the civil service law and the rules prescribed thereunder; and the power of investigation is, in time, co-extensive with the taking effect of the act.
3. The provision of the civil service act which empowers the commission to prescribe, amend and enforce rules for carrying the act into effect, which rules have the force and effect of law, is not a delegation of the power to make laws, but of administrative powers and duties for the making of this particular act effective.
4. Authority to declare that in certain cases, where qualifications of a scientific or professional character are required, competitive examinations may be omitted and the position filled in the manner therein designated, does not invest the commission with arbitrary or uncontrolled discretion, but directs the method of procedure where the condition described is ascertained to exist, and is in no way a grant of the power, exclusive in the General Assembly, to suspend law.
5. The authority granted by Sections 20, 21 and 28 to fix rules, duties, compensation of assistants, and penalty for violations, do not, if invalid, affect the constitutionality of the act in its general and dominant provisions, and in no way affect rights involved in an investigation by the commission.

6. The provisions of this act do not violate the Fourteenth Amendment of the Constitution of the United States by denying the equal protection of the law.

A. Jay Miller, J. W. Flaughner and Geo. W. Poland, for plaintiff.

T. S. Hogan, Attorney-General, and N. J. Weisend, contra.

RATHMELL, J.

The plaintiff, mayor of Urbana and a tax-payer, seeks to enjoin the state civil service commission from conducting a contemplated investigation touching the mayor of Urbana and the municipal civil service commission of said city concerning certain acts alleged to be in violation of the civil service laws of the state.

It appears that on the 17th of January, 1914, certain citizens of Urbana complained to the state civil service commission to the effect that David M. Green, the mayor of said city, removed the whole municipal civil service commission of Urbana without any real cause, but upon certain pretended charges made by him against them; and that he thereupon removed said commission as a body without any public hearing, and appointed another municipal civil service commission to enable him to effect a removal of different subordinate officers and employees for political purposes; that said mayor, without any just cause, but for political reasons, suspended Wm. F. McGree, the chief of police of said city, upon charges having no foundation, and caused same to be heard before the municipal civil service commission appointed by him; that twenty days after said suspension, said commission assumed and pretended to remove McGree as chief of police, he being guilty of no offense or dereliction of duty and competent. That the mayor then appointed to said office a person inexperienced in the duties thereof.

The petitioners complain of other acts of Green, in the way of harassing and annoying police and subordinate officers, by insisting upon their resigning their positions in order to make places for persons who have supported him for office or were ac-

1914.]

Green v. Commission.

ceptable to him for other reasons, but against whom no just charges could be filed.

A further complaint filed with the state civil service commission on January 17, 1914, by a number of citizens of Urbana charges the municipal civil service commission of Urbana with an abuse of their powers in removing William F. McGree from the office of chief of police of said city of Urbana, in certain matters, and prays that the state civil service commission make an investigation of said charges with reference to the violation of the civil service laws of the state.

The state civil service commission thereupon notified the plaintiff that on the 27th of January, 1914, a prospective hearing by the commission to investigate the substance of the charges filed against the mayor, and also those against the municipal civil service commission of Urbana.

David M. Green was elected mayor of Urbana at the November election, 1913, and took office on January 1, 1914, succeeding himself as mayor.

The chief of police was suspended by the mayor December 26, 1913; the charges of the mayor were filed with the municipal civil service commission which met on December 31, 1913, adjourned until January 4, 1914, met and adjourned until January 8, 1914, and after the production of evidence rendered a decision on January 15, 1914.

The grounds for the relief sought are that the civil service law (103 O. L., pp. 698 to 713), under which the commission claims to be proceeding is unconstitutional and void, and that such contemplated investigation on the part of the commission is without and beyond the authority granted to them by said alleged act.

The defendants by joint answer deny the act alleged is unconstitutional; they aver that plaintiff has made no demand that the action be brought by the proper officer; that he has no capacity to sue as a tax-payer; they deny that they propose to place plaintiff on trial for removal, but aver they propose to investigate the enforcement and effect of said civil service act as made by the plaintiff and the civil service commission of Urbana.

(1) It is contended that injunction will not lie in the case presented—that plaintiff has an adequate remedy at law.

The court is of the opinion where it is claimed a public officer assumes and threatens to exercise power not conferred upon him by law, and such action will result in a serious injury to a private citizen, or that he acts under an unconstitutional or invalid statute, that authority supports the contention that injunction is the proper remedy; and that a tax-payer has sufficient interest to maintain an action to enjoin action by public officers under an invalid law which will affect the property of the state or the amount of taxes to be paid. *State v. The City*, 57 O. S., 430; *The E. Gas & Water Co. v. The City*, 57 O. S., 374, 383, 384; *State v. Gilbert*, 70 O. S., 229, 257; *State v. Board of Education*, 7 C. C., 152; 22 Cyc., 881, 885; 23 L. R. A., 410, *State v. Fagan*.

(2) Does the state commission in the proposed investigation assume the exercise of authority beyond the provisions of the act as found in 103 O. L., 698-713?

It is the contention of plaintiff that the law makes such a distinction between the service of the state and its counties, in contra-distinction to the service of the cities and city school districts, that in no case is power conferred on the state commission to investigate the conduct of the mayor of a city.

The court is of opinion such power is found in Section 7 of the act, paragraph 3.

The commission shall make investigation * * * concerning all matters touching the enforcement of this act and the rules prescribed thereunder.

And we hold this general power is nowhere taken away in any of the subsequent or preceding sections.

In Section 19 the municipal civil service commission is given the same authority with respect to the service under its jurisdiction as the state commission is given with respect to the service under its jurisdiction—shall exercise the power and duties with respect to the civil service of the city and city school districts as conferred upon the state commission with respect to the civil service of the state. But we think this is not a limitation upon the power of the state commission to investigate in a proper case

concerning matters touching the enforcement and effect of the act and the rules prescribed thereunder.

This oversight of the state commission as to the enforcement of the act appears to be reflected at a number of points in the legislative act.

In subdivision 5 of Section 7, it is the duty of the state commission to report to the Governor annually and whenever requested, by him, its own action, the rules in force and any recommendations which the commission may have for the more effectual accomplishment of the purpose of the act.

In subdivision 1 of Section 7, they prescribe and enforce rules for carrying into effect the provisions of this act.

In subdivision 19, if the appointing authority of any city fails to appoint a civil service commission as provided by law within sixty days after he has the power to so appoint, the state commission shall make the appointment. And if such municipal commission fails to submit rules in pursuance of the provisions of this act within a certain time, the state commission makes the rules.

The municipal commission is required to make reports from time to time as the state commission may require. And if a state commission have reason to believe that the civil service commission of any city is violating or failing to perform its duties imposed by law upon it or any member of such municipal commission is so doing it may institute an investigation and make a report to the chief executive of such city.

It would appear that if the state commission can not make investigation as to abuse of enforcement of the act other than of the state service, the means for fulfilling the duty cast upon the state commission of enforcing rules for carrying into effect the provisions of the act would be very inadequate for the larger part of the civil service. While such an observation is not decisive as to legislative power conferred by the act, it is a result to be considered, if the power to investigate plainly appear as an aid to the performance of their duties under the law, as that construction of a statute which will defeat its purpose wholly or partly is always to be avoided if possible. But it is contended

that the matter complained of against plaintiff occurred prior to January 1, 1914, consequently there could be no color of law by which the commission could hold an investigation of such acts.

Section 2 of this act provides that on and after January 1, 1914, appointments to the civil service shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations. And that on and after said date no person shall be appointed or removed by any other means than provided in this act.

"Appointments" here can hardly be said to apply to those already appointed.

Section 31 provides that officers and employes in the classified service holding their positions under existing civil service laws shall when this act takes effect be deemed appointees under the provision of this act.

By this provision the chief of police was an appointee under the provisions of this act, which act as to such matters became effective in August, 1913; and by provision of the statute, Section 4477, General Code, was amenable to the civil service commission then existing, until the rules provided in compliance with the provisions of this act became operative.

Construing the two sections together the court is of opinion there is color of law by which the state commission could hold an investigation of a matter touching the enforcement and effect of this act. The complaint purports to effect an appointee under the operation of this act. The matter complained of viewed as one transaction, in fact culminated January 15, 1914.

In the judgment of the court the method of appointments and removals provided for in Section 2, bearing in mind those already in the service and deemed appointees under Section 31 of this act, does not limit an investigation of a matter touching the service under this act to January 1, 1914. But the power of investigation, in time, is co-extensive with the taking effect of this act.

In so far as contention is made against investigations of the complaint against the municipal commission by the state com-

1914.]

Green v. Commission.

mission, we hold Section 19 gives specific authority for such a proposed inquiry.

(3) Paragraph 1 of Section 7 is challenged as unconstitutional and void.

This, it is contended, is a delegation of power to make laws. scribe, amend and enforce rules for carrying into effect Section 10 of Article XV of the Constitution and the provision of this act, and such rules shall have the force and effect of law.

This, it is contended as a delegation of power to make laws. The law in question contemplates and provides that appointments and promotions in the civil service shall be made according to merit and fitness—to be ascertained as far as practicable by competitive examinations, for classification of the service and examination of applicants—and clothes this commission with the powers and duties of prescribing rules to carry the provisions of the act into effect. This is not, we think, delegating the power to make laws, but the power of administering and executing the provisions of a law enacted by the Legislature. It is a delegation of *administrative* powers and duties, and we know of no provision of the Constitution prohibiting bestowal of administrative and executive powers and duties for making effective the provisions of law enacted.

Similar provisions in the civil service laws of other states conferring on commissions appointed to carry the provisions of the law into effect, and make rules not inconsistent with existing laws to guide and control their discretion—such rules to have the force of law—have been approved as not being a delegation of the power to enact laws, but merely a delegation of administrative powers and duties. *Dillon on Municipal Corp.*, Sections 397, 398, 399; *Opinion of Justices*, 138 Mass., 601; *Opinion of Justices*, 145 Mass., 587; *The People, ex rel Akin, v. Kipley*, 171 Ill., 44, 45.

A similar authority is contained in Section 1048, General Code, with reference to rules and regulations adopted by chief examiner, respecting steam engineers, has been approved and held not in contravention of the state Constitution. *Theobald v. The State*, 10 C.C.(N.S), 536.

No exercise of power of the commission with respect to paragraph 1, Section 7, is charged or involved in the proposed investigation. But the court is of opinion that the power and duty of prescribing and enforcing rules for carrying into effect the provisions of this act, and that such rules shall have the force and effect of law, when not inconsistent with existing law, conferred by said paragraph and Section 1, is not invalid.

(4) It is also contended that Section 14, Subdivision 2, is unconstitutional as in violation of Section 18, Article I of the Constitution in that it bestows a power of suspending laws exclusive in the General Assembly.

The section provides that positions in the competitive class may be filled in case of a vacancy in a position where peculiar and exceptional qualifications of a scientific, managerial, professional or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainment in such qualities, the commission may suspend the requirement of competition in such case, no suspension to be general in its application to such place and all such cases of suspension to be reported by the commission in its report with the reasons for the same.

The law in this sub-section challenged provides when in the case described (when competition is impracticable), a competitive examination may be omitted and a vacancy in a position filled as designated in the section.

The meaning and intent of this part of the statute appears to me to be clear, that the commission does not suspend any provision of the law, but that the law describes a situation under which competitive examination is to be omitted by the provision of the law itself. It is one of the administrative functions of the commission provided by the act that the commission ascertain the facts and conditions under which the law—not the commission—exempts competitive examinations. And the authority thus conferred invests the commission with no arbitrary and uncontrolled discretion, but directs when the situation described is ascertained

1914.]

Green v. Commission.

to exist to apply the rule of law under the prescribed terms and conditions of the act. And we hold that the provision for the execution for such an administrative function is not a delegation of the legislative power of suspending laws in violation of the section and act mentioned.

A similar statutory provision has been ruled upon in the case of *State, ex rel Buel, v. Freor*, 146 Wis., 291, 304, 5 and 6, and held not to be legislative in character.

(5) Some suggestion is made that Sections 20, 21 and 28 are unconstitutional as delegating the power to fix by rules, duties and compensation of an assistant as unreasonable; and as vicious in affixing penalty for violation of rules of the commission.

We have had in consideration the matter of the validity of the act affecting the power to prescribe and enforce rules, not inconsistent with law, for carrying into effect the provisions of the act as bestowal of administrative power and duties.

None of the points made as to the validity of the sections just mentioned are claimed to affect the rights of plaintiff in this action as involved in an investigation. If the provisions of these sections should in a proper case be found to be invalid (which we do not hold or find) the invalidity of such minor provisions not involving the whole act, would not in my judgment affect the constitutionality of the law in its general and dominant provisions which form a valid and proper system of regulation of the subject. These sections have not, therefore, received special consideration as to validity further than to find they are not so interwoven and so inseparably connected in subject-matter as to invalidate the general act.

(6) Neither in the opinion of the court do the provisions of the act violate the fourteenth amendment of the Constitution of the United States in denying the equal protection of the law. This point is not specially argued by the able counsel for the plaintiff. The following authorities apparently sanction this form of legislation as not in violation of the fourteenth amendment. *Hope v. City of New Orleans*, 106 La., 345; *People v.*

Loeffler, 175 Ill., 585; *People v. Kenney*, 89 Div. (N. Y.), 171; *Rogers v. Com. Council*, 123 N. Y., 173.

It follows from the foregoing that while the form of action selected is the proper one to try the question presented by the petition, we find the points urged for relief are not well taken; that the commission is not without color of law to make an investigation for proper purpose designated in the act. And since equity will not interfere when public officers are acting or proposing to act within the authority conferred upon them by law, the injunction under the agreed state of facts should be denied and petition dismissed at plaintiff's costs.

ALIENATION OF HUSBAND'S AFFECTIONS.

Superior Court of Cincinnati.

MARGARET BINDER V. AMELIA BULLER.

Decided, January, 1914.

Husband and Wife—Abandonment of Wife Not Necessary to Entitle Her to Maintain an Action for Alienation of Her Husband's Affections.

An action may be maintained by a wife against another woman for the alienation of her husband's affections, without proof of actual separation, if it be shown that there has been a loss of the consortium.

E. P. Bradstreet, for plaintiff.

Joseph B. Derbes, contra.

OPPENHEIMER, J.

The petition in this case alleges that "defendant secretly, stealthily and maliciously pursued plaintiff's husband * * * and wickedly, purposely and maliciously sought to win his affections and love from plaintiff * * * and appropriate the same to herself." It further alleges that defendant "did * *

1914.]

Binder v. Buller.

* wickedly, maliciously and knowingly seduce plaintiff's said husband * * * whereby defendant destroyed plaintiff's peace and happiness, alienated her husband (*sic*), broke up her home, and deprived her of the love, affection and peaceful consortium of her said husband."

To this petition defendant demurs upon the ground that it does not state facts sufficient to constitute a cause of action.

The petition is, to say the least, a bit disappointing to us. It starts out bravely enough, but weakens perceptibly toward the end. It does not boldly charge that defendant succeeded in her nefarious purpose—perhaps plaintiff's pride would not permit her to make such an assertion. It states merely that defendant "*sought* to win" the affection and love of plaintiff's husband, leaving at first the inference that plaintiff may still possess them in all their pristine purity. But, we are then informed, plaintiff's peace and happiness have been irreparably destroyed by defendant's machinations, her home "broken up," her husband "alienated," and the "love, affection and peaceful consortium" of her husband irrevocably lost to her, and her spiritual misery can be mollified only by the payment of material dollars.

Upon examining this subject, we are forcibly struck by the fact that at common law a gross inequality existed in the relative rights of the male and female. We have frequently heard that the laws were made by and for man, and that the "female of the species" who, in the language of Kipling is "more deadly than the male," was invariably kept in subjection. Her rights and privileges were uniformly curtailed, while those of man were enlarged and protected. Husband and wife were one—but he was *the one*. However, in the matter of alienating affections, the rule seems to have been inexplicably reversed. If a man stole the love of his neighbor's wife, the heavy hand of justice was swift to descend upon him and transfer to the bereft husband a substantial portion of his available assets. But a woman might lay siege to the heart of a married man and capture it with impunity. Of course, this disparity of privilege was manifestly unjust and inequitable, but it was the law—the *man-made* law.

(*Lynch v. Knight*, 9 H. L. C., 577). It is only proper to notice, however, that it does not seem to have been the divine law, for if the Bible is to be trusted, David's ravishment of Uriah's wife was deemed but a venial fault; while if Joseph had been a wedded man public sentiment would doubtless have supported his wife in an action against Mrs. Popiphar for attempted seduction—though it is scarcely in accord with modern criminal law to condemn a woman upon the uncorroborated testimony of a man who is seeking to exculpate himself.

At common law, then, it seems that a wife could not maintain an action for the alienation of her husband's affections because (1) she had no *property right* in them (3 *Blackstone Comm.*, 143), and (2) she could not sue alone, and it was not seemly that the husband be permitted to join with her to redress a wrong in which he was a participant (*Bassett v. Bassett*, 20 Ill., App., 543). The language of Blackstone is somewhat significant: "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." (It is noteworthy that this language comes from England, the birth-place of the militant suffragette.)

Modern statutes enabling married women to sue generally, and securing to them property rights, have done away with this disability, and established the wife's "property right" in her husband's companionship and affections, and her authority to maintain a separate action for the invasion of that right. Section 11245 of the General Code of Ohio gives to a married woman the same rights she would have in this respect if she were unmarried.

Thus in the case of *Seaver v. Adams*, 66 N. H., 142, in which it is held that a married woman may maintain an action against another woman for the seduction of her husband, the court expresses itself in this vigorous language:

"As the only reason why a wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage and merged into his * * *

1914.]

Binder v. Buller.

there remains now not the semblance of a reason why such an action may not be maintained here."

In our own state, the Supreme Court has likewise spoken in no unmistakable terms. In *Westlake v. Westlake*, 34 O. S., 621, Chief Justice Gilmore, after reviewing the early English cases, recites the several legislative acts in this state, and says:

"This legislation, in effect, abolishes the common law unity of person in husband and wife, so far as that unity is represented solely by the husband, and in its stead introduces a rule analogous to that of the civil law, by which the wife is so far regarded as a distinct person, that she may have her separate property, contracts, credits, debts, and injuries growing out of a violation of any of her personal rights, all of which shall be and remain under her sole control; and in matters concerning them, or any of them, she may sue or be sued alone."

If, then, the wife has the same right of action as a husband in such cases, the question is naturally presented, whether the husband might, under such circumstances as those set out in the petition herein, maintain an action for the alienation of the wife's affections. Defendant contends that there is no allegation in this case that plaintiff has been separated from her husband, and that in fact no such separation has taken place, but that she is still residing with him and that he is still supporting her.

As there seems to have been no determination of this question in this state, we have been compelled to examine the question generally for the purpose of determining both the weight of authority and the advisability of following it.

In *Bigelow on Torts*, Eighth Edition, 277, it is said:

"It is * * * unnecessary that there should be any separation or pecuniary injury; in which respect the action resembles that of a parent for the seduction of his daughter."

In *Bishop on Marr., Div. & Sep.*, Section 1361, it is said:

"One who, by improper means, alienates a wife's affections from her husband, though she neither leaves him nor yields her

person to the seducer, injures the husband in that to which he is entitled—brings unhappiness to the domestic hearth, renders her mere services less efficient and valuable, and inflicts on him a damage * * * so that for the redress of this wrong an action is maintainable.”

In the case of *Rhinehart v. Bills*, 82 Mo., 534, which holds that an action is maintainable by the husband without proof that the wife has been induced to leave him, the court says:

“The injury to defendant consists in the alienation of his wife’s affections with malice or improper motives. Debauchery and elopement, when they occur, are only the immediate and legitimate consequences of the wrong. * * * The alienation of the wife’s affections for which the law gives redress, may be accomplished notwithstanding her continued residence under her husband’s roof. Indeed it has been not infrequently remarked by authors and jurists that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation.”

The same rule is applied in the case of *Heermance v. James*, 47 Barb., 121, where it is said:

“Her actual presence with him, under such circumstances, maintaining and exhibiting towards him such feeling, could afford him no relief, but would rather add the provocation of insult to the keenness of the injury inflicted; it would continue before him a present, living, irritating, aggravating, if not consuming source of grief, which her absence might in a measure relieve.”

It seems that in all such cases the gist of the action is the loss of consortium, which is said to include “society, companionship, conjugal affections, fellowship and assistance.” Manifestly, all these may be absent despite the mere physical presence of the wife. And so equality of right would demand that the wife be likewise entitled to the conjugal society of her husband and that she be given the same remedies against one who might deprive her thereof. Modern views of the marriage ceremony would

1914.]

Binder v. Buller.

not tolerate any other idea. It is no longer supposed that she requires the protection of the law to any greater extent than the husband, but she is manifestly entitled to it to the same extent as he.

And we find that the authorities bear us out in this view to a considerable extent. True, this view does not seem to be supported by the case of *Duffies v. Duffies*, 76 Wis., 374, or by the case of *Doe v. Roe*, 82 Me., 503, or by the early case of *Logan v. Logan*, 77 Ind., 558. But it is supported by so many cases that we shall refer merely to the monographic note to the case of *Clow v. Chapman*, 125 Mo., 101, found in 46 Am. St. Rep., 474.

It might be particularly interesting to refer to the case of *Bennett v. Bennett*, 116 N. Y., 584, in which the court says (page 590):

“The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. * * * The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation.”

In the case of *Footte v. Card*, 58 Conn., 1, the court says:

“It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of, her right to redress is absolute; it can not be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past.”

It would seem to us that a contrary view would necessitate a disregard of the entire similarity of rights of the husband and

wife and a retroversion from the progress of the past. We are not so jealous of the privileges bestowed upon husbands by the common law, nor so insensible to the spirit of the times, as to adopt such views.

Counsel for defendant, who has apparently made an exhaustive search of the authorities has laid particular stress upon the cases of *Whitman v. Egbert*, 50 N. Y. Supp., 3, and *Van Olinda v. Hall*, 34 N. Y. Supp., 777. The former decides merely that it is not enough to show that plaintiff's husband abandoned her for defendant if there is no evidence that defendant, by her acts or words, encouraged him to do so; and the latter decides that, there being no evidence of any influence, proper or otherwise, to alienate plaintiff's husband, and no evidence of any illicit relations between them, a verdict for plaintiff could not stand. And the fact that this court deliberately uses the expression "alienate the husband," sufficiently justifies the use by the plaintiff in this case of the same expression, however distasteful it may be to counsel for defendant.

Demurrer overruled.

1914.]

State v. Brown et al.

DISCHARGE OF A DEFENDANT FOR FAILURE TO PROSECUTE.

Common Pleas Court of Hamilton County.

STATE OF OHIO V. HARRY BROWN, RAY LONG AND ALFRED SEGAL.

Decided, January, 1914.

Criminal Law—Right of a Defendant to a Speedy Trial—Attitude of the Ohio Courts With Reference Thereto—Constitutional and Statutory Provisions.

1. After the lapse of three or more terms of court from the return of an indictment it is a matter of discretion on the part of the trial judge whether a motion to be discharged for failure to prosecute shall be granted.
2. The only grounds under the statutes and the decision of the Supreme Court in *Ex Parte McGehan*, which justify a continuance of a case to the next term, is the absence of material evidence to procure which the state has exercised reasonable efforts, and a showing that there is just ground for believing that such evidence can be procured at the next term of court.

Thomas L. Pogue, Prosecuting Attorney, for the State.

J. W. Curts, contra.

GORMAN, J.

On motion to discharge defendants for failure to prosecute.

On the 6th day of April, 1907, the defendants, Brown, Long and Segal, were jointly indicted by the grand jury for criminal libel. Without setting out in full the indictment, it charges in substance that these defendants did on the 30th day of October, 1906, unlawfully and maliciously write, print and publish a certain false and malicious libel of and concerning one George A. Gohen, the clerk of the board of deputy state supervisors and inspectors of elections in and for Hamilton county (commonly called the board of elections) and there is set out in full the alleged libel which it is claimed was published in the *Cincinnati Post* on said 30th day of October, 1906, and which in substance

is claimed to have charged said Gohen, as clerk of said board, with holding up and delaying the printing of the registration lists of voters in several precincts of the city of Cincinnati where election frauds had prevailed, for the alleged purpose of aiding the so-called Cox gang in the election to be held in November, 1906, and to hamper, hinder and delay the honest elections committee in its efforts to ferret out fraudulent registrations and prevent illegal voting especially in the fourth, sixth, eighth and eighteenth wards of said city, all of which publication it is set out was contrary to the statute in such case made and provided and against the peace and dignity of the state of Ohio. The indictment is signed by H. M. Rulison, then prosecuting attorney of Hamilton county, and indorsed "A True Bill" by the foreman of the grand jury.

Upon its face the indictment shows that it was not reported and filed until more than five months after the alleged publication of the libel. Immediately on the filing of the indictment, April 6th, 1907, warrants were issued for the three defendants and upon their arrest they entered into bail for their appearance as provided by law. Thereafter motions to quash and demurrers were filed and overruled by the court during the year 1907, and on December 17, 1907, by consent of parties a continuance of the trial of the prosecution was had until the January term, 1908. No trial was had in the January, April, July or October terms, 1908, but on the 8th of December, 1908, an entry was made reciting that the case has been set for trial for December 17, 1908, and the same is continued for further setting and that the defendants be remanded for further proceedings. Nothing further appears of record in the case until December 29, 1911, except that there is a general entry on the journal of the court continuing all cases, prosecutions and matters not finally heard and disposed of until the next succeeding term of court, for want of time to hear the same. This formal entry was made at the close of each term of court by the clerk, without any application from the defendants and without their knowledge or consent. On December 29, 1911, the judge then sitting in the criminal division or room of this court entered a *nolle prosequi*

1914.]

State v. Brown et al.

on the indictment upon the recommendation in writing of the prosecuting attorney, Henry T. Hunt, wherein he expressed doubt as to whether or not the publication was libelous, and further stating that the case had been pending nearly five years and had been pending for almost two years before he, Mr. Hunt, took office and that in his opinion a conviction was almost impossible; that a trial would involve great expense to the state and nothing would be accomplished; that a prosecution of the case would serve no good end, and that the prosecuting witness, if wronged, had a remedy in a civil action at law. On the day following the entry of the *nolle*, the judge who entered the same, on the motion of Mr. Muller, attorney for George A. Gohen, the prosecuting witness, set aside the *nolle*.

Thereafter, down to the January term, 1914, a period of two years, nothing appears to have been done in the case, except that the clerk of his own volition made the general entry on the journal at the close of each term, continuing all cases and matters undisposed of until the next succeeding term because of the want of time to hear the same. No such entry was specially made in this case under the number and caption of the case at any time.

At the beginning of this term (January, 1914) the court directed the prosecuting attorney to set for trial and hearing all pending cases and prosecutions beginning with the oldest pending case, and lo! and behold! this case appears, still pending and never tried, although a lapse of almost seven years has occurred since the return of the indictment, and twenty-seven terms of Court.

On the day the case was set for trial, January 19, 1914, the defendants filed a motion to be discharged, setting out that since the return of the indictment no action has been taken in the case except the filing and overruling of the motions to quash and the demurrers; that they have been held by recognizance to answer said indictment without trial for a period of more than three terms, not including the term at which recognizance was first taken thereon; that they entered into recognizance bonds and pleaded "not guilty" on January 3, 1908; that no continu-

ance was had upon their motion since said pleas were entered at the October term, 1907, and that the delay in the trial of this prosecution was not caused by any act of theirs or either of them, and that there was time at the third term after the taking of said recognizance in which to try the case and that there has been time for said trial since that time.

Upon the presentation of this motion for hearing the prosecuting witness was present and also the prosecuting attorney. The prosecuting attorney, in answer to the court's inquiry as to the truth of the matters set forth in the motion, stated in open court that said matters and things set out therein were true, and that the prosecuting attorney could only submit the matter to the court as a question of law to be determined upon the motion and the record of the case. The prosecuting witness stated that he had no personal interest in the prosecution and no motive to subserve except to do his duty as a citizen; that he has always been ready and willing to appear and testify but has never been called upon to do so; that he is now ready and willing to appear and testify if and whenever the case may be called for trial. It was stated by counsel for the defense and admitted by the prosecuting attorney that a material witness, Mr. Achilles Pugh, who printed the registration lists of voters in 1906, has since died, but the prosecutor stated that if the court should overrule this application and order the case to be tried the state would be prepared to go to trial within twenty-four hours from the time of making such an order. It further appears that up to the time of Mr. Pugh's death all the witnesses needed by the state, including the prosecuting witness, were within easy reach in this county. No excuse was given by the prosecutor for the delay, except that he—Mr. Pogue—the present prosecutor, should not be blamed entirely for the delay, inasmuch as Mr. Rulison was prosecutor for almost two years after the indictment was returned and Mr. Hunt was prosecutor for three years succeeding Mr. Rulison, and that he, the present prosecutor, had been in office but two years of the lapsed period. The court believes that the present prosecutor can not reasonably be charged with more than two-sevenths of the delay and that the

1914.]

State v. Brown et al.

remainder of the delayed time should be charged up to his predecessors.

The question now submitted to the court on the foregoing facts is, whether or not this motion or application of these defendants should be granted. Under the Constitution of the United States and the Constitution and laws of this state are the defendants entitled to a discharge and should they now go acquit for the failure of the state to give them a speedy public trial?

By the VI amendment to the Federal Constitution it is provided that:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” * * *

The fathers of the great republic, of which we have the honor to be citizens, were familiar with the numerous instances of persons charged with the commission of crimes being immured in dungeons and their trials put off until, in many cases, death nollied the charge, and released many an innocent person from his suffering and imprisonment. They well know that in the history of the English people the event that shone brightest was that memorable struggle which involved the life or death of those fundamental rights of universal interest, the right to life, liberty and the enjoyment of happiness, the right of the government with reference to persons accused of crime to have a speedy and impartial trial by a jury of their peers—that struggle with the obstinate and tyrannical King John, which ended at Runny Mead in wresting from him the Great Charter, the Petition of Rights and the Habeas Corpus Act, and from which time the historian Hallam tells us no man can be detained in prison without trial. It was with knowledge of this great struggle in their minds that the framers of our national Constitution inserted the guaranty contained in the amendment just cited. And this guaranty of “speedy trial” covers every citizen and sojourner within our gates like the Aegis of Minerva. The framers of the first Constitution of Ohio in 1802, not to be outdone by those who brought into the world a new nation, caused to be inserted

in the fundamental law of this state, Section 11, Article VIII, Constitution of 1802, which among other things guarantees, that:

“In all criminal prosecutions the accused hath a right * *
* to a speedy public trial by an impartial jury of the county or district in which the offense shall have been committed.” etc.

Again in 1851 the framers of our state Constitution in the Bill of Rights, Article I, Section 10, reaffirm in *hæc verba* the provisions of the Constitution of 1802 with reference to a speedy trial in criminal prosecutions.

Almost, if not all, the states of the Union have constitutions containing substantially the same guaranty of a speedy trial in criminal prosecutions; so that it may be said that this great shield of defense has been bequeathed to us not only by the fathers, but has been inherited as an heirloom from the common law of England.

The Legislature of Ohio, for the purpose of quickening and giving effect to this provision of our state Constitution has in Sections 13685, 13686 and 13687, General Code, provided the course to be pursued by an accused person, whether imprisoned or held on bail, to be discharged without a trial whenever his constitutional right has been invaded by a refusal or neglect to afford him a speedy trial. Section 13685 applies to a person detained in jail awaiting trial, and is otherwise similar to Section 13686. Section 13686 affects and applies to persons released on bail and reads as follows:

“A person shall not be held by recognizance to answer an indictment, without trial, for a period of more than *three* terms, not including a term at which a recognizance was first taken thereon, if taken in term time. He shall be discharged unless a continuance is had on his motion, or the delay is caused by his act, or there is not time to try him at such *third* term, in which case he must be brought to trial at the next term or discharged.”

Section 13687 reads as follows:

“When application is made for the discharge of a defendant under either of the next two preceding sections, if the court is

1914.]

State v. Brown et al.

satisfied that there is material evidence for the state which can not then be had, that reasonable effort has been made to procure it and there is just ground to believe that such evidence can be had at the next term, the cause may be continued and the prisoner remanded or admitted to bail. If he be not brought to trial at the next term thereafter he shall then be discharged."

Considering these sections together with the constitutional provisions referred to, let us first examine the authorities in this state, wherein a construction has been placed upon either or all of these sections, to ascertain the attitude of the Ohio courts on this question of a speedy trial.

The first found is that of *Ex parte James McGehan*, 22 Ohio State, 442. McGehan was indicted for first degree murder in Butler county—a non-bailable offense. He entered a plea of not guilty at the January term, 1871—the same term at which he had been indicted, and he was committed to jail. On his application a change of venue was had at the June term, 1871, to Preble county, and the cause removed to that county and McGehan transferred to the jail of that county. No action was taken to try his case at the November term, which was the first term after the June term. At the next term in February, 1872, being the third term after the term at which he had been indicted, McGehan, who was still in jail, moved the court for his discharge on the grounds that he had not been brought to trial before the end of the second term after the term at which he had been indicted. This motion was overruled and McGehan committed to jail. That part of the indictment which charged premeditation and deliberation was then nollied and McGehan admitted to bail on the charge of manslaughter, and on *his own motion* the cause was continued to the next term of court. Thereupon McGehan applied to the Supreme Court for a writ of habeas corpus against the sheriff of Preble county asking to be discharged. In deciding the case the court refused the writ on two grounds:

First. The writ of habeas corpus would not lie so long as the order of the common pleas court overruling the prisoner's motion to be discharged remained in full force and unreversed, even

though it was an erroneous order, and further that the order could not be reviewed in a habeas corpus proceeding, as that would be a collateral attack before another tribunal.

Secondly. The court held that in order to entitle the prisoner to a discharge on the ground that he had not been brought to trial during the time limited by these sections (then Sections 161-162, code) now Sections 13686-13687, General Code, he must make application to the court therefor, and if when he makes such application, whether during the time limited or at a subsequent term of court, the state is ready to proceed with the trial or makes the showing to the court that there is material evidence which can not be had, that reasonable exertions have been made to procure the same and that there is just ground for believing that such evidence can be had at the succeeding term, the cause may be continued.

In the case at bar no such condition exists. The state does not claim that there is material evidence which could not be procured, nor does it ask for a continuance to the next term. The only grounds under the statute and this decision upon which this court would be justified in continuing this case to the next term would be the absence of material evidence, to procure which the state had used reasonable efforts; and a showing that there is just ground for believing that such evidence can be procured at the next term. No cause whatsoever for continuance is shown in the case at bar. When this application was made and heard the state was not then ready for trial, but the prosecutor stated in open court that if the court should overrule the motion of the defendants, it could be prepared for trial within twenty-four hours from that time. But even if the state were ready for trial when the motion was made and heard herein, or if it had cause for a continuance and were making an application therefore, nevertheless it rests in the sound discretion of the court to either grant the motion for discharge, or grant a continuance. The accused may not then be entitled, as a matter of right, to be discharged, nor is the state, as a matter of right, even though then ready to proceed to trial, after the lapse of more than three terms from the return of the indictment, entitled to have

1914.]

State v. Brown et al.

the motion denied and proceed to trial. The language of the statute (Section 13687) is, *may* be continued, not *shall* be, indicating that the matter is left to the discretion of the court. And it will be shown by decisions to be cited that this is the view entertained by courts which have passed upon similar statutes.

The next case in Ohio wherein these sections were construed is *Erwin v. State*, 29 Ohio St., 186, and the court in that case held it was not error on the part of the court of common pleas to overrule an application to be discharged by a prisoner held in jail on an indictment, when the state was *then* ready for trial at the time the motion was taken up for consideration, the same being the last day of the term, and the motion having been filed but two days before the last day of the term. A perusal of the facts set out in this case will disclose that the defendant in that case did not bring himself within the terms of the statutes to entitle him to a discharge, and so the court held that under the facts of that case the accused's application to be discharged should have been refused, if the state was ready for trial.

In the case of *Johnson v. State*, 42 Ohio St., 207, the question for determination was whether the court had power to continue a cause of one held in jail under indictment, when one continuance had already been granted because of the absence of material witnesses, at the second term after such imprisonment. It was held that notwithstanding such first continuance, the court had power to again continue the case because of a want of time to try the cause at the term when the second continuance is granted. Judge Okey who announced the opinion in this case in speaking of the rights of the accused and the discretion lodged in the court to grant or refuse a discharge, says, on pages 208 and 209:

"Of course, when it appears that the statute has been *disregarded*, the accused is entitled to a discharge. But it must be remembered that a discharge is equivalent to a verdict of acquittal with judgment thereon. *Ex parte McGehan*, 22 O. S., 442; *Erwin v. State*, 29 O. S., 186."

And again on page 210, he says:

“As the court was vested with discretion to continue the cause for want of time to try it and exercised the power on November 3, 1883, being the last day of the May term, we are clear that the motion on November 5, 1883, being the first day of the November term, before the calendar for that term had been prepared, was unreasonable and might properly have been overruled at that time,” etc.

In the case of *Corbett v. State*, 5 C. C. (old series), 155, the court held that it was not error on the part of the common pleas court to overrule the accused's several applications to be discharged because he had not been brought to trial within the time limited under these sections under consideration.

These are the only Ohio cases under these sections which the court has been able to discover after diligent search, and the purport of all of them is to be the effect that under the facts of each case it was not error to refuse the accused's application for discharge; that he was not in each case, as a matter of right, entitled to a discharge; but that the granting or overruling of the application for discharge rested in the sound discretion of the court to be exercised for the purpose of promoting justice and to be granted if the facts of the particular case warranted, and to be denied if the circumstances were such that the granting of the application would work an injustice and allow the guilty to escape. It involves the exercise of a discretion which can not be reviewed or overthrown unless it be shown that the court exercising the discretion was guilty of an abuse thereof.

In England, from the earliest times, a prisoner, in theory at least, enjoyed the right to a speedy trial which was procured for him by the commission of jail delivery which issued to the justices of Assize, and twice every year resulted in the jails being cleared and the prisoners confined therein being convicted and punished, or freed from jail.

By a speedy trial is meant one that can be had as soon after indictment as the prosecution can with reasonable diligence prepare for, regard being had to the terms of the court.

Cooley, in his work on Constitutional Limitations, 7th Edition, 440, says:

1914.]

State v. Brown et al.

“Again it (the Constitution of the United States) requires that the trial be speedy; and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is feared that they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused.” Citing *Curtis v. State*, 6 Cold., 9.

He further says that further delay, beyond the first term after the indictment is returned, would not generally be allowed, without a more specific showing of the causes which prevent the state from proceeding to trial including the names of the witnesses, the steps taken to procure them and the facts expected to be proved by them in order that the court might judge of the reasonableness of the application (for delay); citing *U. S. v. Sacramento*, 2 Mont., 239; *Hancock v. State*, 14 Texas App., 392; *State v. Flooks*, 65 Ia., 452.

In the case *Ex parte Turman*, 26 Tex., 708, the court in commenting on this subject, says:

“The criminal courts are under obligation to proceed with reasonable dispatch according to the circumstances of the case.”

The writ of habeas corpus was called into use in England and it was adopted as a part of our Federal Constitution to grant relief and liberty to those who were detained and imprisoned and denied the right to a speedy trial.

Will it be claimed by any one for a moment that reasonable dispatch or speed has been shown by the state in the case at bar, which has been allowed to slumber like Rip Van Winkle for a period of seven years notwithstanding the fact that all of the witnesses, so far as the court can learn, could have been brought into court within twenty-four hours and a trial had if the prosecuting attorneys, who have been in office all these years and the prosecuting witness, who has lived in this county continuously since the return of the indictment, had cared to press the case for trial? The very fact of the failure to bring the defendants to

trial during this long period of time raises a strong suspicion in the mind of the court, that the prosecution was not begun in good faith, nor the delays caused by any reason other than neglect of duty on the part of the state's counsel, or a reckless disregard of their duties to the state and to the defendants. When no reason is given for the delay, it not having been caused by applications for continuances on the part of the accused persons, it is reasonable to believe that the purpose in holding this prosecution over the heads of the defendants, like a sword of Damocles, in view of the character of the alleged libelous publication, has been to terrorize and intimidate the newspaper that published the article, and its staff of reporters and editors.

It is said by the court in the case of *Benton v. Commonwealth*, 90 Va., 328:

"But the policy of the law and the right to a speedy trial forbid that a person accused of crime shall be detained beyond any term of court at which he may be lawfully tried, unless good cause is shown for a continuance."

It is said in the case of *People v. Matson*, 129 Ill., 591, that a statute providing that an accused person should be brought to trial within a specified time (such as our statutes) is mandatory and imperative in its provisions and confers no discretion on the court.

In the case *In re McMicken*, 39 Kas., 406, the court said that the accused is entitled to be discharged after the lapse of time prescribed by law, where he has not been tried, if he brings himself within the statute by showing that he was not at fault and that he did not apply for a continuance, and where the prosecution shows no valid cause for delay.

To the same effect are the cases of *Robinson v. State*, 12 Mo., 592; *Cummins v. People*, 4 Colo. App., 71; *Brady v. People*, 51 Ill. App., 112; *Walker v. State*, 89 Ga., 482.

In the very strong case of *In re Begerow*, a habeas corpus case, 133 Cal., 349, it was held that:

"A party charged with a crime has the constitutional right to a speedy trial, and the court has no discretionary power to

1914.]

State v. Brown et al.

deny him a right so important, or to prolong his imprisonment, without trial beyond the time provided by law.”

In this case, contrary to the rule laid down in *Ex parte McGehan*, 22 Ohio St., it was held that habeas corpus would lie; and on a showing that a delay of sixty days, the time limited in the statute in that state, had elapsed before trial, without fault on his part and without his consent, and that the postponement was not had on his application, the defendant was entitled to be discharged on habeas corpus.

In the Kansas case, *supra*, *In re McMicken*, it was held also, that the accused could invoke the writ of habeas corpus to be discharged where he had not been granted a speedy trial.

See also to the same effect: *In re Garvey*, 7 Colo., 502; *People v. Douglass*, 100 Cal., 1; *U. S. v. Fox*, 3 Mont., 512; *State v. Rutherford*, 16 Tex. App., 649; *State v. Brodie*, 7 Wash., 442.

So that while the rule in Ohio and many other states is that in a proper case and on a proper showing by the accused the court has a discretion to discharge him or not, where he has not been brought to a trial within the statutory time, and the delays were not on his applications for continuances, or caused by his fault; in many other states the constitutional guaranty of a speedy trial imposes a mandatory duty upon the courts to discharge him upon his application, and a showing that he comes within the terms of the statute; and this court is of the opinion that upon a strong showing, such as has been made in the case at bar, it is not only discretionary with, but mandatory on the court to discharge the accused persons. A denial of the application of the defendants in this case would, in the opinion of the court, be a denial of their constitutional right and guaranty to a speedy trial.

If this case ever was one of great public interest it has long since ceased to be such, because of the failure to bring it to trial when the public may have been interested in the prosecution. The prosecuting witness in this case has another remedy in a civil action for defamation and libel if the publication was false and malicious, and this remedy he can pursue not only against the individuals indicted, but also against the owners and pub-

lishers of the paper wherein the article was published. Indeed, I am credibly informed that he did bring such a suit at or about the time this prosecution was set on foot. However that may be, it appears to the court that no useful public purpose can be subserved by continuing on the calendar of pending cases this ancient, hory-headed, untried prosecution, smacking largely of a personal and political character, growing out of incidents of days long past, when charges and counter-charges of political chicanery and corruption were the order of the day and looked upon as matters of course; when the administration of public affairs was such in many cases as to give just cause for severe criticism of many of our public officials.

It may be doubted whether this publication is criminally libelous, in view of the wide latitude allowed the press under the Constitution of the United States and the Constitution of this state, the former of which, Article I (amendment), prohibits Congress from abridging the freedom of the press, and the latter (Bill of Rights, Section 11) saves to every citizen the right to freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and prohibits the passage of any law to restrain or abridge the liberty of speech or of the press.

The prosecuting witness, at the time the alleged libelous article was published, was a public servant occupying a most important and responsible office, aiding in the administration of the laws, affecting the sacred rights of our citizens to vote and exercise their sovereignty. He was as such, a proper subject of fair criticism—but not, of course, false accusations or defamation.

He was a shining mark and a conspicuous target for the press and those actively engaged in the political contests; he was the cynosure of all the eyes of the electors; and it is scarcely to be wondered that he was criticized and perhaps libeled—yea, perhaps libeled in this case—but as to that the court expresses no opinion.

In *Boyle v. State*, 6 C. C., 163. it is said:

“A newspaper may with good motives and for justifiable ends, freely and boldly and with severity or ridicule, criticise and

1914.]

State v. Brown et al.

comment upon the official conduct of public officials and draw any deductions from those actions and circumstances which, with any show of reason or fairness, might be claimed to follow therefrom."

It is the fate of those who perform public duties to hear themselves criticized, and frequently slandered and libeled; and if the time of the courts were taken up with actions or prosecutions smacking of libels and slanders of public officials, a very considerable amount of annoying litigation would be occupying the forum of justice. Happily for us, very few public officers, who are criticized or libeled or slandered, take it seriously enough to resort to the courts for vindication, but are usually content to leave the question of the truth or falsity of the charges to the judgment of the American public, and to stand upon their own records and their character and reputation in the community. The sense of fair play of the American people and their keen foresight and knowledge of men and events, rarely fails to enable them to reach a correct conclusion as to the character, integrity and efficiency of their public servants.

If one has left the community in which he has resided for a long time, has disappeared and not been heard of or from for a period of seven years, the law presumes such a one to be dead. If this rule may fairly be applied to this prosecution and this indictment, it not having been tried for seven years, a presumption ought to arise that the case is dead—and of all the dead we mercifully say—"de mortuis nil nisi bonum," and upon their tombs we inscribe: "*Requiescat in pace.*"

It is time that this prosecution be ended and the accused released from its terrors. The motion to discharge the defendants for the reasons set out will be granted, and a judgment in accordance with this finding entered on the journal.

**FUNCTION OF THE TRIAL JUDGE WHERE THE FACTS
ARE CONCEDED.**

Common Pleas Court of Franklin County.

FRED DAVIS V. THE COLUMBUS RAILWAY & LIGHT COMPANY.

Decided, December, 1913.

Determination of the Legal Sufficiency of the Facts Presented—Is a Function of the Judge and Not of the Jury—Judgment Granted on the Petition and Opening Statement of Plaintiff's Counsel to the Jury.

1. A motion by a defendant for judgment on the petition and the opening statement made to the jury on behalf of the plaintiff, lies where it appears from the petition and the statement of counsel that the plaintiff left his seat in the car nearly a square distant from the point where he expected to alight, and took his stand on the running-board and looking backwards instead of forward, was struck and injured by a wagon which was in full view and an obvious danger, and which the car passed while running at its usual rate of speed.
2. An application for leave to amend a petition made during pendency of motion for non-suit, will be denied, where it appears that nothing could be stated by the plaintiff which would disclose a right of recovery.

Weinland & Scarlett, for plaintiff.

Booth, Keating, Peters & Pomerene, contra.

KINKEAD, J.

Motion is made by defendant for judgment upon the pleadings and opening statement made to the jury on behalf of plaintiff.

It is alleged that:

“Plaintiff, desiring to leave said car at Norwich avenue
* * * rose from his seat after the said car passed Lane
avenue, stepped to the running-board on the right side of the car
in order that he might leave said car promptly at Norwich ave-
nue, and stood upright on said running-board, holding, with his
hands to two hand grasps and looking at the same time toward

1914.]

Davis v. Railway.

the conductor, who was in the rear part of said car, in order to signal for his stop. While plaintiff was attempting to signal the conductor for his stop, the defendant's motorman * * * negligently drove the same past the said wagon, and thereby hurled plaintiff * * * with great force against said wagon," etc.

"The said collision and * * * injuries were caused solely by the negligence and the lack of proper care of the defendant in the following respects:

"(1) The negligent driving and operation of the said car in such manner that a person on the running-board would and did come in violent contact with the said wagon; and

"(2) The failure of defendant's employees in charge of said cars to give notice and warning to said plaintiff of the danger from said wagon."

The opening statement discloses that the accident occurred in daylight; that the wagon was in plain sight so the motor-man and conductor could see it; that plaintiff was struck instantly on stepping on the running-board; that the speed of the car was the usual speed.

The expression so often made and found in the books that the question is one for the jury, under the particular circumstances of the case, to determine whether a party was negligent or not, is sometimes used as an excuse for accurate perception and proper reasoning and logic and perspicuity of statement.

It is the function of the jury to decide controverted facts, and to draw inferences from facts when rational and reasonable minds may differ as to the appropriate inference.

It is the function of the judge to charge the law applicable to the different phases of facts shown by the evidence, or to the different views which the jury may take concerning controverted facts.

To state, as in the opinion in *Traction Co. v. Bryant*, 30 Tex. App., 437, "and whether the passenger be standing upon the platform, running-board or steps, is held to be in the majority of cases a question for the jury to determine" does not set forth a logical or correct proposition of procedural law.

The same objection may be made to the first proposition in the syllabus in *Vessels v. Ry. Co.*, 129 Mo. App., 708, namely:

"Whether it is negligence for a passenger with the knowledge and implied assent of the trainmen to take a position on the careless safe than that of riding in a seat is a question for the jury."

The reports and books are full of such loose and meaningless statements. They do not at all correctly state the proper function of judge and jury.

On conceded facts, from which there may be only one rational conclusion drawn, as for example, that a party has not observed ordinary care, or that no duty has been violated, presents no question of fact for a jury, but merely invokes the function of the judge in applying the law.

So in this case as it is presented by the petition and the opening statement, the facts as pleaded and as stated in the opening statement are conceded but their legal sufficiency is questioned.

In other words, do they state a cause of action against defendant? To decide that makes it necessary to determine whether actionable negligence on the part of the defendant is shown, and whether plaintiff himself was negligent. If it should be concluded that it shows that both parties were negligent, it would be essential to determine whose negligence caused the injury.

It is held that:

"In the absence of any special circumstances, such as a regulation of the railway company properly published or brought to the knowledge of the passenger (*Cutts v. Boston Elevated Railway*, 202 Mass., 150), or the existence of known or probable dangers calling for special care to avoid them, it is for the jury to determine the negligence or due care of a passenger who is riding upon a more exposed part of a street railway car, such as the front or rear platform or the running-board of an open car." *Heshion v. Railway*, 208 Mass., 117, 118, citing *Beall v. Railway*, 157 Mass., 444; *Sweetland v. Lynn*, 177 Mass., 514; *Pomeroy v. Ry.*, 193 Mass., 507; *Eldridge v. Boston Elevated Ry.*, 203 Mass., 582.

To state that the defendant's motorman negligently drove the same (that is, the car) past the wagon may be characterized

1914.]

Davis v. Railway.

as a general allegation of negligence, which under the rules of pleading is said to be good as against demurrer.

But this so-called general allegation becomes merged into the specific acts of negligence subsequently alleged which consist of "the negligent driving and operation of the said cars in such manner that a person on the running-board would and did come in violent contact with wagon," and the failure to give notice and warning to the plaintiff.

So we proceed upon these more specific alleged acts of negligence.

The indefiniteness and uncertainty of the first specification is cleared up by the opening statement. It is claimed that the car was run at its ordinary rate of speed past the wagon, and that no notice or warning of the danger from the wagon was given. It is also stated the plaintiff got up from his seat in the car just before the car reached the wagon and that he was struck instantly on stepping on the running-board. This discloses that plaintiff proceeded to the running-board to place himself in readiness to alight quite a distance before reaching the place where he was to alight.

From the opening statement it appears that one passenger on the first car had started to get on the running-board, but discovering the danger from the wagon he desisted. From this statement, and in the absence of an allegation otherwise, and from the fact that plaintiff was struck immediately upon getting on the running-board it must be concluded that no passenger or passengers were riding on the running-board at the time the motorman drove the first car past the wagon.

These must be the facts to which the court is to apply the law. If not, full and fair opportunity will be afforded counsel to further state the facts.

That being so, there was then no necessity or occasion for running the car exceedingly slow, or to warn any one of the danger.

The motorman and conductor had the right to assume that plaintiff would observe ordinary care for his own safety; they had the right to assume that the plaintiff—as did the passenger

in the front car—would not leave a place of safety and step down on the running-board, without using his senses and discovering the danger.

While it was the duty of the servants of the defendant to observe the utmost care and vigilance to protect the plaintiff as a passenger, this measure of care and duty exacted of defendant does not require it to guard against the negligence of plaintiff, excepting and only when it discovers him to be in a place of danger through his own acts.

The rule that it is not *per se* negligence to ride on the running-board can not apply to the conduct of plaintiff in this case. He was not riding on the running-board; he had just stepped down on it, getting in readiness to alight quite a distance before reaching his alighting place, and was instantly struck by the wagon.

The servants had no opportunity to warn him of his danger. This, therefore, disposes of all the claims that are made by plaintiff against defendant as to negligence on its part.

Plaintiff can not avail himself of the municipal ordinance requiring street cars to move at a certain speed past such a wagon, and to give warning, because, in the first place, it is not pleaded. In the second place, plaintiff was not riding on the running-board, but had merely stepped there in readiness to alight.

In respect to the conduct of plaintiff, it will not do to merely say, as in *Mason v. Railroad*, 180 Mass. 225, that: "Riding on the running-board of an open electric car can not be said to be negligence of itself and as matter of law." That is beside the question and does not apply here. Merely riding on the running-board is not, as matter of law, negligence. It was stated by this court in *Spencer v. Cols. Ry. & L. Co.*, No. 63,399:

"The law is that it is not *per se* negligence for a person to ride on the running-board. Whether or not he is negligent depends upon the particular circumstances in the special case. Of course it is obviously more dangerous to ride on the step or running-board, and notwithstanding the fact that the company may customarily permit passengers to ride on the running-board, a duty is imposed upon a passenger so placing himself on

1914.]

Davis v. Railway.

the car. The law exacts of him that he shall be careful and prudent.”

The plaintiff was bound to observe ordinary care for his own safety; such degree of care requires that he use his sense of sight. If he had looked at all in the direction he was going even as he stepped towards the running-board, he could have seen the wagon and discovered the danger. It was an obvious one to any one desiring to do what he was about to do. Instead, as the petition avers, he was looking backward toward the conductor, who was checking up his accounts. It was clear that it was some little time before the conductor would look out for the stop. Though a passenger is not guilty of contributory negligence *per se* in riding on the running-board, he is bound to exercise reasonable care, and if he fails so to do is guilty of contributory negligence. (Note 8 St. Ry. Reports.)

The plaintiff in choosing to step on the running-board assumed all of the ordinary risks, which included the danger from wagons standing as this one was. It did not include the negligence of defendant. But our reasoning eliminates this question.

The question here is wholly unlike that in *Mason v. Railway*, 180 Mass., 255. There the plaintiff stepped on the running-board to alight and while walking along to get a bundle he had left in a seat was struck in the head by a pole placed and maintained by defendant. Of course, it was not negligence as matter of law for the passenger in such case to do what he did. The placing and maintenance of the pole under such circumstances was negligence.

So in *Sweeny v. Cable Co.*, 150 Mo., 385, where the gripman negligently ran into a broken wagon, which he could have seen had he been looking out, and as to which he was warned by a passenger, the court held that there was ample evidence of the negligence of the defendant to take the case to the jury, and that the plaintiff was not guilty of contributory negligence in being on the running-board, even though the evidence showed that other passengers standing thereon jumped back into the car to escape injury.

It is not essential that a car stop on account of a wagon situated as this one was. The standard of duty fixed by municipal ordinance does not require it unless it becomes essential. It had a right under the circumstances of this case to pass by it. And persons who are in the habit of riding on street cars of the city are expected to be aware of the customary habits of cars of the railway in passing such wagons.

A broken wagon in such close proximity to a passing car as to endanger the safety of passengers on a running-board, as in *Sweeny v. Cable Co.*, 150 Mo., 385, is not one of the customary ordinary risks assumed by a passenger on a running-board.

The case of *Heshion v. Boston Elevated Ry. Co.*, 208 Mass. Reports, 117, is clearly in point:

"If one, who had been employed by a street railway company as a conductor for three years, becomes a passenger upon an open electric street car of the same company, takes his position upon the running-board and, as the car passes through a very busy street with which he is entirely familiar and in which there is a space of eight feet and two inches from the running-board to the curbstone, stands holding to the unrights of the car, facing the car's interior and not looking out to see whether he is in danger of coming into contact with teams or obstructions in the street, and is struck by the pole of a cart which he easily could have seen had he looked in the direction in which the car was going, and could have avoided by temporarily stepping into the car between the seats or drawing himself farther into the car, he can not be said to have been in the exercise of due care, since with a knowledge of the dangers attending his position, he disregarded them."

The conclusion must be that the conceded claims made by plaintiff merely invokes the duty of the court to apply the law thereto and pronounce judgment.

To decide otherwise would require the court to adopt a rule of care which would impose a duty upon the motorman to do the impossible thing of looking backward to see if any passenger was going to place himself in a position of danger without observing what he was doing. Or it would require the conductor to stand on watch to discover whether a passenger was looking out for

1914.]

Davis v. Railway.

and protecting himself from a usual and obvious peril arising from stepping upon a running-board, such as is mentioned in *Elliott v. Ry. Co.*, 18 R. I., 707.

It is stated in this case that:

“A passenger who rides on the footboard of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there, such, for instance, as injury from passing vehicles.”

It is equally true that he is obliged to look out for and protect himself from vehicles standing as the one in this case was, and over which defendant had no control.

Before announcing this opinion application was made to the court by counsel for the plaintiff for leave to amend the petition.

After hearing the argument the court concluded that as the jury had been impaneled and a motion had been submitted for judgment upon the pleadings and upon the opening statement of counsel, that the court under such circumstances had no discretion to grant such application. The rule is properly expressed in *Rau v. Residen*, 11 C.C.(N.S.), 255:

“The power to discharge the jury in a civil cause during trial or after the cause is submitted and before verdict is not discretionary in a court, but must be based on a finding that some necessity exists for such action, or upon consent of both parties, and where the record discloses no necessity for such action beyond a bare request by the plaintiff, and no consideration by the court of the necessity for so doing, the discharge is unauthorized and deprives the court of further jurisdiction, and a motion to dismiss should be granted.”

The conclusion of the court is that the application to amend shall be denied, for the reason that it is plain under all the circumstances now appearing to the court that nothing could be stated by plaintiff to disclose a right of recovery. The judgment of the court is that the motion for a judgment on the pleadings and the opening statement of counsel is sustained, and the action of the plaintiff is dismissed.

**DAMAGE TO PROPERTY FROM ESCAPE OF CONTENTS
OF A VAULT.**

Superior Court of Cincinnati.

RUHAMA D. MURRAY V. ELIZABETH H. BUCKNER, EXECUTRIX OF
THE ESTATE OF WILLIAM T. BUCKNER, DECEASED.

Decided, December, 1913.

*Nuisance—Damage to Property and Loss of Use Thereof from Escape of
Contents of Vault—Right of Action Abates on Death of the Owner.*

1. An action by a property owner against the owner of adjoining property, for damages to real property and for loss of use of property, arising out of the overflow and seepage of filth from a vault or privy maintained upon the latter's premises, is an action for damages for a nuisance and not an action for damages for trespass.
2. Such an action falls within the provisions of Section 11397 of the General Code, and abates by the death of the owner upon whose premises the vault was maintained and during whose lifetime the damage complained of were suffered.
3. A cause of action for a nuisance existing against the owner of real property, abates upon his death, the same as if an action thereon was pending at the time of his death, and such cause of action can not be asserted in an action brought after his death against his estate.

Howard L. Bevis, for plaintiff.

Waite & Schindel, contra.

SUTPHIN, J.

This is an action for damages to real property and for loss of use of property. Plaintiff is the owner of a lot and brick building at No. 534 Clinton street, Cincinnati, and the defendant is the owner of property immediately adjoining on the west upon which is a brick building and in the rear of which is a closet built over a vault in close proximity to the dividing line between the two properties. The petition charged that the closet and vault were used by tenants who occupied the defendant's building, and that for a period of four years past de-

1914.]

Murray v. Buckner, Executrix.

defendant maintained this vault in such a defective condition that water therefrom had been allowed to escape and flow over onto the plaintiff's property, and also to percolate through the soil onto the plaintiff's property so as to cause a settling of the soil with the consequent cracking of the foundation and walls of the rear part of plaintiff's house; that this water had even seeped through the foundation walls of plaintiff's building in such quantity as to cover the floor of the cellar to a depth varying from two to twelve inches, thereby greatly inconveniencing the plaintiff in the use of same and furthermore by reason of the foul character of the water greatly interfering with her use of the rear end of her premises.

The original petition in the case was filed November 13, 1912, and an amended petition later on in May, 1913. To this amended petition the defendant filed an answer which consisted of a general denial.

At the opening of the trial counsel for plaintiff and defendant entered into a stipulation by the terms of which it was agreed that the defendant's property was owned by William T. Buckner in his lifetime and up until his death, which occurred April 30, 1912; that William T. Buckner by will devised the property to Elizabeth H. Buckner, the present owner. It was further agreed that the claim sued on was confined to damages suffered during the lifetime of William T. Buckner.

The plaintiff introduced evidence substantially supporting the allegations contained in the petition, and at the conclusion of the plaintiff's case defendant made a motion to arrest the case from the jury and to direct a verdict for the defendant, which was granted and a verdict for defendant was returned.

In support of this motion counsel for defendant contended that this was an action for damage for a nuisance, and as the acts and resulting damage complained of had occurred during the lifetime of William T. Buckner, the owner, his death caused an abatement of the action by virtue of Section 11397 of the General Code. Counsel for plaintiff, on the other hand, contended that this was an action for damages to real property for trespass and as such survived the death of the owner by virtue of Section 11235 of the General Code.

The first question therefore is whether this is an action for damages for a trespass or one for damages for a nuisance. At common law an action for trespass was very clearly distinguished from an action "on the case" for nuisance. Blackstone has said that trespass signifies no more than an entry on another man's ground without a lawful authority and doing some damage however inconsiderable, to his real property. See Vol. 2 Cooley's Blackstone, 2d Ed., 209. This was sometimes described as *trespass quare clausum fregit* or *trespass vi et armis*. The essential idea seems to have been the breaking of a close by force, and so great regard did the law have for a man's premises that it presumed damage would accrue from the breaking into or penetrating such close, even if it was no more than the trampling of the herbage therein. On the other hand, an action, "on the case" was where the injury resulting from the action was not caused by direct force but was consequential. As was stated in the case of *Hicks v. Drew*, 117 Cal., 305:

"One of the best tests by which to distinguish trespass is found in the answer to the question: When was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essential consequential, and no trespass."

In this connection Joyce in his work on Nuisance, Section 17, says:

"The distinction between a nuisance and a trespass is that in the former the injury is consequential and results generally from some act committed beyond the limits of the property affected, while in the latter the infringement of the property rights is direct and the injury immediate. The act in the former is wrongful because of the consequent results. It consists in such use of one's own property as to injure some right of another."

This distinction has been recognized as early as 1846 by the Supreme Court of Ohio in *Harrington v. Heath*, 15 Ohio, 483, which involved the jurisdiction of a justice of the peace in an action for damages resulting from the erection of a dam across a certain water course causing it to flow back upon the land of plaintiff. If this was an action for trespass the justice of peace

1914.]

Murray v. Buckner, Executrix.

had jurisdiction, whereas if it was an action on the case for nuisance, the justice of peace was without jurisdiction. The court held that such state of facts gave rise to an action for nuisance and not for trespass, and in that connection said:

“The words *trespass* and *case* both, in their ordinary and legal sense, have a different meaning; the word *trespass* applying to injuries resulting from direct force, and *case* to such as are consequential.”

This principle is further illustrated in the case of *Williams v. Coal Company*, 37 O. S., 583. The plaintiff and defendant were owners of adjoining lands, both engaged in the business of mining coal. The defendant, while excavating coal on his lot mined over onto the plaintiff's lot some thirty-five or forty feet, and then abandoned the mine. Subsequently the plaintiff, in ignorance of the over-working of the defendant, started to mine his own land and struck the working which had been done on his land by the defendant, and the water from the abandoned workings of the defendant flooded the plaintiff's mine, thereby causing him serious damage, and some five years later he brought suit for damages. The plaintiff contended that it was an action for damages for a nuisance, while the defendant claimed that it was an action for trespass and that as it had not been brought within the statutory period of four years it was barred. The Supreme Court sustained the contention of the defendant, and held that it was an action for trespass on the ground that the defendant had made an excavation and aperture in the plaintiff's land. In other words, the damages were directly caused by an overt entry on plaintiff's land. The court, on page 588, expressly distinguishes it from the case where structures have been erected and maintained upon the lands of defendant to the nuisance or injury of plaintiff's premises.

The structure in this case was a closet or vault (commonly known as a privy) located entirely upon defendant's land. The complaint is not addressed to the structure itself, but to the consequences resulting from the condition which defendant permitted to exist with reference thereto. The law is quite clearly

established that if such a structure is permitted to remain in such condition as to annoy others or damage their property, it becomes a nuisance *per se* for which damages may be recovered. *Wood on Nuisances*, 2d Ed., 64:

“Privies are regarded as *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of their property, by reason either of the noisome smells that arise therefrom, or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the wall of a well or spring, *they are nuisances* in fact and render the person erecting or using them liable for all the injurious consequences growing therefrom.”

To the same effect is the case of *Monroe v. Koring*, 12 Ohio Dec., 561, which was a decision by Judge Jackson of this court in 1902 on an application to enjoin defendants from maintaining a vault and for damages. The facts are very similar to those in the case at bar. The condition of the privy vault on the premises of the defendants was such that at certain times it permitted water, filth and other substances to leak and penetrate through and upon the plaintiff's house and premises. The injunction was granted and damage recovered on the theory that this was a nuisance.

The same principle is announced in two certain cases which involved facts almost identical to those in the case at bar. *Finkelstein v. Huner*, 77 App. Div., 424 (aff. 79 N. Y., 548); *Iliff v. School Directors*, 45 Ill. App., 419.

In this latter case the court said:

“A privy so constructed as to contaminate water of a well used for domestic purposes, or which is allowed to remain in such condition that persons dwelling near it are rendered uncomfortable by the escape of noxious smells and filthy matter is a nuisance *per se*.”

Further cases illustrating the doctrine of private nuisances are: *Davis v. Niagara Falls Tower Co.*, 171 N. Y., 336; *Exley*

1914.]

Murray v. Buckner, Executrix.

v. *Southern Cotton Oil Co.*, 151 Fed. Rep., 101; *Alston v. Grant*, 3 Ellis & Blackburn's Rep., 128.

The cases above cited are readily distinguishable from an action in trespass such as is found in the case of *Bank v. Telegraph Company*, 79 O. S., 89, where the telegraph company went onto the plaintiff's farm and cut the limbs and branches of his trees.

Our conclusion therefore is that the allegations of the petition and the evidence in support thereof clearly establish that the vault in question constituted a nuisance, and that the personal discomfort and injury to property complained of were consequential and resulted from the existence of such nuisance on defendant's property; this clearly characterizes the action as one for damages for a nuisance.

It having been agreed to by counsel that the cause of action set forth in the petition arose during the lifetime of William T. Buckner, and that the damages claimed were suffered during his lifetime, the next question is whether the cause of action abated by his death on April 30, 1912. This involves the construction of the following sections of the General Code:

Section 11397 provides:

"Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, *for a nuisance*, or against a justice of the peace for misconduct in office, which shall abate by the death of either party."

Section 11235 provides:

"In addition to the causes which survive at common law, causes of action for mesne profits, *or injuries to the person or property*, or for the deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the party entitled or liable thereto."

There is an apparent inconsistency of language in these two sections in that by the terms of one we find that an action for injury to property survives and may be brought notwithstanding

the death of the party liable thereto, while in the other, in equally positive terms, we find that an action for a nuisance, which may also be an action for injury to property, abates upon the death of the person liable thereto.

An examination of the early history of Section 11397 discloses that under the civil practice act of 1831 (Swan's Statutes, Ed. 1840), it was provided that among those actions which abate by the death of either party were "actions *on the case* for nuisance." When the civil code was adopted later on, the words "*on the case*" were dropped out for the reason that all common law actions relating to procedure were abolished—the nature of the action, however, remained the same.

Considerable light is shed upon this section by a decision of the Supreme Court of Ohio in 1889, *Cardington v. Fredericks*, 46 O. S., 442. This was an action against a municipality for personal injuries resulting from an unsafe and dangerous condition of a highway, and the court held that such an action was "for a nuisance," *i. e.*, for maintaining a nuisance from which private damage ensued within the meaning of the then Section 5144, Revised Statutes (now Section 11397, General Code), and that it abated upon the death of the party injured. In other words, while a cause of action for injuries to the person would ordinarily survive, yet where the injuries are caused by a nuisance they are held to abate by the death of either party.

In 1909 the Supreme Court affirmed without report a decision of the General Term of this court, involving a similar question. See *Cincinnati v. Darby, Admr.*, 5 N.P.(NS.), 216; 18 O. Dec., 253 (aff. 80 O. S., 733). In that case one Anna Williams sued the city of Cincinnati in damages for personal injuries resulting from the improper construction and maintenance of a sidewalk in a defective and dangerous condition. While the case was pending Anna Williams died and the suit was revived in the name of her administrator and a judgment recovered. The general term reversed the judgment and dismissed the petition on the ground that the action was one for a nuisance, which abated by her death. The Supreme Court affirmed this reversal. During the interval between the decisions in the *Card-*

1914.]

Murray v. Buckner, Executrix.

ington and Darby cases certain changes had been made in the language of the two sections under consideration. The language of these statutes is substantially the same today as it was when the Darby case was decided. The opinion of the General Term in the Darby case is particularly instructive as it contains a very able review of the history of these two conflicting sections, and in commenting upon them in connection with the Cardington case, the court drew a very concise conclusion as follows:

“The language throughout the opinion implies a clear distinction between ordinary actions for injuries to persons or property, through negligence *per se*, and injuries to persons or property caused by a nuisance. The former were preserved by Section 5144, while the latter were positively abated by the same section.”

Furthermore, the court held that Section 5144 (now 11397) was a limitation upon Section 4975 (now 11235). This conclusion was based upon the fact that under the original arrangement in the civil code these sections followed each other.

These authorities clearly establish that an action for personal injuries resulting from a nuisance is to be considered an action for a nuisance within the meaning of the statute. No distinction can be made between such an action and one for damages to property resulting from a nuisance.

The further suggestion has been urged that this action was not pending at the time of the death of William T. Buckner and therefore would not fall within the provisions of the statute. Such contention conflicts with the well defined spirit of the statute, for there could be no real difference between a cause of action in existence at the time of the death and an action which was pending, except as to the right to a revivor, which in turn would depend upon whether or not the cause or right of action was one which survived the death. It is not reasonable to suppose that the Legislature intended to give a right of action against the executor of an estate, which if it had been brought against the testator during his lifetime would

have abated at his death. This view is supported by the opinion of the general term in the Darby case, where the court says:

“It is not to be supposed that the Legislature intended to confer upon an executor, with respect to an action not brought by the testator, a power greater than if the suit had been actually brought by the testator during life.”

Aside from that however, it appears that a similar suit had been brought in this court against the testator, William T. Buckner, shortly before his death. Instead of attempting to revive the action however, against his estate, the suit was dismissed and the case at bar was brought in its stead. In this view of the case from a legal standpoint it would be the same as an attempt to revive the original suit.

The court is therefore of the opinion that the cause of action in the present case is one for damages resulting from a nuisance, and as such abated with the death of William T. Buckner, defendant's testator. The court might add, however, that this conclusion has been reached with considerable reluctance in view of the hardship which it works on the plaintiff.

The motion for a new trial will therefore be overruled.

1914.]

State v. Detterline.

PROSECUTING WITNESS INCORRECTLY NAMED.

Common Pleas Court of Licking County.

STATE OF OHIO V. SAMUEL DETTERLINE.

Decided, January Term, 1913.

Criminal Law—Plea in Abatement Comes too Late, When—Misnomer of Prosecuting Witness—Idem Sonana.

A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witness has been incorrectly named in the indictment it is too late to interpose a plea of abatement.

J. Howard Jones, Prosecuting Attorney, for plaintiff.

J. F. Lingafelter, contra.

FULTON, J. (orally).

In this case the prosecuting witness was examined in chief by the state, and was turned over for cross-examination, when the defendant, by his attorney, asked her what her name is, and she said Ruby Reynolds. The indictment charges that her name is Ruby Randals. Then he asked her how she spells her last name, and it was difficult to tell how she said she does spell it, but I will take it for granted that she did spell it the way it is claimed—Reynolds. There the evidence stopped, and it is sought now to file a plea in abatement, in which the defendant says the evidence in this case shows that the name of the prosecuting witness, upon whom the rape is charged to have been committed, is Ruby Reynolds, while the indictment charges that the said alleged rape was committed upon the person of Ruby Randals, and defendant asks to be discharged upon the plea of *idem sonans*. The plea is signed by the attorney for the defendant and is sworn to as the statute requires.

I admire the industry of counsel for the defendant in this case, and the interest that he has taken for his client. There is a rule of law which is applicable to this matter, that wherever the decisions have laid down a certain manner of procedure,

and our Legislature changes that procedure, the rule in the books, or the common law rule, as we sometimes call it, is abrogated by the statutes, and the statutes then become the rules upon which the procedure must be had.

Section 13616 reads as follows:

“A motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged.”

The next is Section 13622, which reads:

“A plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.”

Section 13623 reads as follows:

“The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged and proof thereof is necessary to make out the offense charged.”

Section 13624: “When a motion to quash or a plea in abatement is adjudged in favor of the accused, he may be committed or held to bail in such sum as the court requires for his appearance at the first day of the next term of such court.”

The last section which I intend to read is Section 13625, which reads as follows:

“The accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue.”

Now I take it that pleas in abatement must be made prior to the plea of not guilty. As the issue has been made in this case, and no plea in abatement filed before the plea of not guilty, I take it that, under that statute, it is now too late to file a plea in abatement.

Counsel for defendant has cited a case which has lately been tried in Columbus where one of the state senators was indicted

1914.]

Bates v. Jeffrey.

for bribery. The prosecution proceeded for a certain distance in the case and then was compelled to desist on account of a failure of proof. We have nothing in the record to show that this dismissal was on account of a plea in abatement. My idea of the case is that the state put upon the stand a witness and that witness testified as to Substitute Bill No. 160, and they proceeded to try to get that before the jury, and an objection was made because the indictment was founded upon Original Bill No. 160. The court excluded the substitute bill, and without that they could not proceed further.

Now, if it is a fact that this witness is not Ruby Randals, and is not the person at all who is charged by the indictment that the offense was committed upon, there will be time enough later on in the case for that point to be raised. You can see what this would cause me to do if I should sustain this motion. The defendant asks that this plea in abatement be sustained and that the defendant be allowed to go hence without day. That I could not do. It would be a great outrage—a wrong—and it would be against justice, and it would be allowing this man, if he is guilty, to escape on a mere technicality. But, if I had the question now before me, in the proper way, at the proper time, I think I would have to hold that it is *idem sonans*. For this reason the plea is overruled.

BOY STRUCK BY AUTOMOBILE.

Common Pleas Court of Franklin County.

RAY S. BATES, ADMINISTRATOR, v. JOSEPH A. JEFFREY ET AL. *

Decided, March 24, 1911.

Negligence—Boy Drops off Rear of Wagon and is Struck by Automobile Following—Owner of Machine Not Liable.

The owner of an automobile, operated at reasonable speed and attempting to pass around a slowly moving wagon, is not liable for striking a boy, who with other children was clinging to the wagon

* Affirmed without opinion, *Jeffrey v. Bates*, 88 Ohio State, —.

and who dropped off after the horn on the automobile had sounded and he had looked around and observed its approach.

M. B. Earnhart, for the plaintiff.

Arnold & Gaine, contra.

DILLON, J. (orally).

I have given more than usual time to the motion in this case. In fact, I have given it more than I think any motion since have been on this bench. It is my duty to do so in such a case as this. An accident of this kind appeals to the human side of a judge as well as to counsel and men generally, and it becomes the court, therefore, in such a case to exercise his judgment with the greatest care.

It is claimed on the part of the defendant by this motion that there is no evidence of negligence shown in this case. I am bound to take the same view that the defense has in this case, that there is not any evidence of negligence.

The evidence in this case is undisputed as to the fact that the horse hauling the milk wagon was walking, the driver of it, Barnes, in the front end, several boys inside, and the unfortunate boy on the step at the side; when about seventy-five yards away the driver of the automobile blew his horn; the little boy turned around and looked; it attracted his attention; he then stepped off of this slowly moving milk wagon; then he stepped back up again; the automobile continued to approach, and the driver blew his horn once more and started to coast around the wagon; the little boy stepped or jumped off. One of the witnesses, little Verner, says he was going over to the curb, and that is confirmed by the chauffeur, although those things occur so quickly that it is difficult to tell. But whether he jumped and stood or whether he was running toward the curb, the automobile stopped in about six feet. It shows, therefore, that the brake must have been applied immediately, because a car, such as a thirty horse power Packard machine of that 1910 model, going at the rate of about six or seven miles an hour, would stop in that distance if the brake were immediately applied.

1914.]

Bates v. Jeffrey.

We have, therefore, but one claim on the part of plaintiff, which, boiled down, means this: that it was negligence for the driver of the machine to attempt to pass the wagon with the boy there, for the reason that the nature of a child is such that it is apt to jump off or liable to do this or that, and that for that reason the driver is bound to anticipate that a child might jump off and he should not attempt to pass the wagon. If we carry that doctrine to its legal conclusion it simply means that no one driving a street car or a horse and buggy or an automobile would dare pass any other vehicle containing children. Here is a man driving his horse and buggy along the street and a child is standing on the curb; he is liable to run out. If he suddenly jumps out and the person driving the vehicle was not guilty of any negligence at the time, it is a mere accident. The chauffeur, therefore, was bound under the law to exercise reasonable care. It was not negligence for him to be running his machine at the rate of about six miles an hour. It was not negligence for him to try to pass the milk wagon in the proper way. There is no evidence here that he attempted to pass in an improper way.

If I could see the allegations of this petition sustained by a scintilla of evidence to the effect that the machine came up in such a manner as to frighten the child, making a noise, blowing the horn or making some noise suddenly without warning in such a manner as to frighten the child, there would be no question about that, because that will frighten a man as well as a boy. A man might jump under those circumstances. But in this case that allegation is not sustained. On the contrary, the evidence shows that the machine was not making an unusual noise; none of the witnesses heard the noise. But it did not make enough noise to attract the attention of the boys inside or the driver, so far as the evidence here shows, although Barnes has not testified.

The motion, therefore, must be sustained.

State, ex rel, v. Schneller.

[Vol. 15 (N.S.)]

CONSTRUCTION OF CIVIL SERVICE PROVISIONS.

Superior Court of Cincinnati.

STATE, EX REL BERTRAM W. JENKINS ET AL, v. FRED C. SCHNEL-
LER, CLERK OF COUNCIL.

Decided, January 20, 1914.

*Civil Service—Went Into Effect, as to Incumbents of Certain Offices,
When—Incumbents Whose Statutory Terms Expired December 31,
1913, Not Continued in Office.*

1. The civil service act of May 10th, 1913 (103 Ohio Laws, 698), in so far as it relates to incumbents of offices and places mentioned in the third paragraph of Section 10 thereof, went into effect January 1st, 1914.
2. The terms of such public offices and positions as are fixed by statute, remain unchanged by the civil service act of May 10th, 1913, and an incumbent on January 1st, 1914, of such office or position, while protected from removal, suspension, reduction or transfer except for cause as therein provided, is not thereby given a new term of office, nor is his existing term thereby lengthened or extended.
3. Incumbents of offices and positions whose statutory terms expired December 31st, 1913, are not continued in office or position thereafter by the civil service act aforesaid.

Moulinier, Bettman & Hunt, for relators.*Walter M. Schoenle*, City Solicitor, and *Charles A. Groom*,
Assistant City Solicitor, contra.

PUGH, J.

On January 1st, 1912, the relators, Bertram W. Jenkins, James P. Kelly, Joseph McClorey, Myrtle Burke, Henry Vanderhaar, Theodore Hollenbeck, George Giesting, Charles O'Brien, Thomas Meehan, Fred Disser and Ada Auberger were elected by the council of the city of Cincinnati to the following positions respectively: record and certificate clerk, sergeant-at-arms, dedication clerk, general clerk, notice record clerk, notice clerk, notice clerk, notice clerk, draughtsman and clerk-stenographer.

1914.]

State, ex rel, v. Schneller.

This election was held under authority of General Code, Section 4210, which provides as follows:

“Within ten days from the commencement of their term, the members of council shall elect a president *pro tem*, a clerk, and such other employees of council as may be necessary, and fix their duties, bonds and compensation. The officers and employees of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council.”

On April 28th, 1913, the General Assembly of this state passed the statute, commonly known as the civil service act, and it was approved by the Governor May 5th, 1913, and filed in the office of the Secretary of State, May 10th, 1913 (103 Ohio Laws, 698, 713).

On January 1st, 1914, the city council, the members of which had been elected on November 4th, 1913, acting on the assumption that the terms of office of the aforesaid relators had expired, elected certain other persons to the positions which the relators had held since January 1st, 1912.

The relators insist that the civil service act aforesaid continued them after January 1st, 1914, in possession of the various positions to which they had been elected two years before, and that, subject to the non-competitive examination provided for in the third paragraph of Section 10 of said act, they are the legal incumbents of said positions; they claim, and it is not denied, that the defendant, Fred C. Schneller, in his character of clerk of council, refuses to recognize them as the legal incumbents of said positions and refuses to allow them to perform the duties of their positions, wherefore they now apply to this court for a writ of mandamus requiring the said defendant to recognize them as legal holders of the various positions above named, and to permit them to perform their public duties as such.

At the request of all concerned, the court passes over preliminary matters and comes at once to the issues arising under the civil service act. It will be assumed, therefore, without discussion, that mandamus is the proper form of action, that the action has been properly brought and that the writ can issue to

the clerk of council to compel him to recognize the relators as prayed for in the petition.

The civil service act begins with the following sweeping declaration of law:

"Section 1. Definition 1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof."

Section 8 of the act provides as follows:

"The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.

"(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in Section 19 hereof."

And thereupon follows a specification, in ten numbered paragraphs, of the offices and positions included in the unclassified service; subdivision (b) of the section (8) follows in this language:

"(b) The classified service shall comprise all persons in the employ of the state, the counties, cities, and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class."

Without further quotation it may be said at once that the classified service, as defined and provided for in the civil service act, includes all those public offices, positions and employments to which appointment or election is made to depend on merit as determined by examination—and, with few exceptions, competitive examination, and from which incumbents can not be discharged, suspended or reduced except for cause, and the unclassified service includes those offices, positions and employments to which appointments may be made or the incumbents elected at the discretion of the appointing officer or board and from which the incumbent may be removed, suspended or reduced at the pleasure of some superior board or officer.

1914.]

State, ex rel, v. Schneller.

It is apparent that by this legislation the General Assembly intended to create a new and comprehensive code of laws governing the appointment to and removal from public office and employment. Civil service laws were already in existence before January 1st, 1914, but they were more or less fragmentary and limited in their application and in effect they have all been swept away by the repeals provided for in the present act. The civil service act of May 5th, 1913, is the first statute which has included and made uniform and equal provision for practically every public employment except those to which the incumbent is elected by popular vote. While in form the entire civil service, state, county, municipal and school, has been divided by Section 8 of the act into two classes, it is evident that what has really been done by this law consists in the establishment of a general system whereby appointments to public service are made to depend on merit as determined by competitive examinations and removals have been forbidden except for reasonable cause. Some employments and positions are of such kind that the special personal qualities which the incumbents must possess in order to render the best service are those which can not be ascertained or measured by competitive examinations, others are of a confidential nature, and still others have already been provided for by laws which are satisfactory and at present require no modification. These are all exceptional cases for which special reasons exist why they should be taken out of the general rule, and compared with the immense number of public offices and positions that must now be filled by competitive examinations, are but few in number. There is also the class of offices to which incumbents are elected by popular vote and which therefore have no place in the civil service system. Elective offices and the exceptional cases referred to are grouped together in the new law and designated as the unclassified service, but it is apparent that they do not really constitute a class by themselves and are nothing more than exceptions to the general rule.

Exceptions such as these, exist in the nature of things and are not merely artificial, and hence appear in every civil service

system that is devised. They constitute a weak spot in the system, the place where abuses are likely to creep in, and the General Assembly of this state recognizing the danger, has taken the precaution to designate specifically the offices and employments which shall be treated as exceptions to the general rule, and has not left this to the discretion of any board or officer. The civil service commission itself has no authority under this statute to determine what offices and positions shall be excepted from the merit class. In some civil service systems the commission or board in charge of the examinations and certifications is given power to designate what particular employments shall be included in the unclassified service and what not, but in the Ohio act this is not left to the discretion of anyone. Municipal civil service commissions are authorized by Section 19 to place in the classified or merit service offices and employments additional to those already designated by the Legislature itself in a previous part of the statute (Section 8) but no corresponding power to put additional offices or employments in the unclassified or non-merit class has anywhere been bestowed upon them.

The civil service act, as already stated, having been passed a few days before, was filed in the office of the Secretary of State, May 10th, 1913 (103 Ohio Laws, 713). Whether, as asserted in argument, the municipal civil service commission as an existing board under Section 19 could organize, formulate rules, hold examinations, prepare eligible lists and the like, at any time after the expiration of the referendum period (August 10th, 1913) and before January 1st, 1914, need not be decided in this case, but the court is satisfied that all the provisions of this statute relating to appointments, removals, suspensions, promotions and reductions of applicants or employees went into effect on January 1st, 1914, and not at any earlier date. Section 2 reads as follows:

“Method of Appointment. On and after January 1st, 1914, appointments to and promotions in the civil service of this state and the counties, cities and city school districts thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable

1914.]

State, ex rel, v. Schneller.

shall be competitive; and on and after January 1st, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

This section, in the opinion of the court, fixes the date at which the law took effect, and with the exceptions already mentioned establishes the date to which all its provisions must be referred.

The terms of office for which the relators were elected by council are fixed by General Code, Section 4210, at two years, and expired therefore on December 31st, 1913. About ten o'clock, A. M., January 1st, 1914, the members of the city council elected November 4th, 1913, met and organized and proceeded at once to elect a clerk and assistant clerk and successors to the relators in the various subordinate positions held by them under the council.

The civil service act, as stated, had been passed during the preceding year and the relators contend that, under the third paragraph of Section 10 of that statute, their terms did not end but that they were thereby continued indefinitely in their positions as employees of council, subject to their passing non-competitive examinations as provided in said section, and that, therefore, they could be removed only for cause.

The third paragraph of Section 10 is as follows:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive examinations shall be given in such manner as the commission may require and all such non-competitive examinations shall conform to those of the competitive service."

There is nothing whatever in this clause nor in Section 2, quoted above, to indicate that, when an incumbent has been ap-

pointed or elected to a position in the public service the term of which is fixed by statute or indeed in any legal way, his term of office shall be extended by the civil service act to any longer period of time than that for which he was originally appointed or elected. A careful reading of the act discloses no such intention on the part of the General Assembly. There is but one place in the statute where there is any reference to any such matter, *i. e.*, in Section 17, which reads thus:

“No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction, or suspension of a subordinate, *whether appointed for a definite term or otherwise*, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended with a copy of the order of the discharge,” etc.

The above italicized clause, which is the only reference in the act to definite terms, indicates that terms of office for specified periods of time may continue to exist under the civil service act the same as before. While the definite term continues, whether the incumbent was originally removable at the pleasure of the appointing officer or only for cause, after the act comes into effect, the incumbent is protected by Section 2, above quoted, and the subsequent provisions. He can no longer be removed, transferred, promoted or suspended except as provided by the new statute, and, if he pass the non-competitive examination mentioned in the third paragraph of section he may continue in office the same as before. But when the period of time for which he was originally elected or appointed expires he must make way for his successor, the same as before. In such case, he is not “removed, transferred, laid off, suspended * * * or reduced,” which are the only risks from which incumbents are protected by the new law, but simply goes out because his term has expired.

The civil service act does not entirely repeal those statutes, which like General Code, Section 4210, prescribe fixed or definite terms of office. So much of this section as is inconsistent with

1914.]

State, ex rel, v. Schneller.

the provisions of the new law is repealed or rather amended, but no more. The method of electing these employees is changed inasmuch as only persons on the eligible list furnished by the municipal civil service commission can be elected, but the clause of the statute which gives the appointing power to council remains unaffected and the term of two years prescribed therein as the term of office is still the law.

It is a well established principle of law that repeals by implication are not favored. When a statute is enacted upon a subject which has already been dealt with by an existing law, it would seem as a matter of course that the General Assembly would provide in the new act for the repeal of the previous one if it was intended to repeal it, and failure to repeal the existing act naturally creates a strong presumption that it was not intended to be repealed. None the less there are instances where the later statute has not in express terms repealed the earlier one and yet is so inconsistent with it or part of it that both can not stand. In such cases the later law repeals the prior one to the extent only, however, to which the inconsistency exists, and this we call repeal by implication. If, however, in such case by reasonable construction the terms of the two statutes can be reconciled and both be preserved, it is the duty of the courts to do so. Applying this rule to the case before the court no serious difficulty is encountered in upholding both statutes. Section 32 provides for the repeal of a number of sections of the General Code, all of which concern previous civil service systems in this state but in nowise relate to terms of office or employment. The same section also repeals "all other acts or parts of acts inconsistent with the provisions of this act," but there is nothing inconsistent between the provisions of the civil service act and statutes fixing definite periods of time during which appointees shall hold certain offices or perform certain duties. Every provision of the civil service act would apply to the incumbent of such an office, without regard to how he was appointed, but his term of office would not be lengthened.

The question we have been discussing has arisen under civil service statutes of other states, and, although these differ in

many particulars from the Ohio law, they are alike in this respect. In deciding a similar controversy under the laws of California, the appellate court of that state in *Rodrigue v. Rogers*, 4 Cal. App., 257, speaking of the effect of the expiration of the term of the complainant after the civil service law had come into operation, said (p. 261):

“When that time expired it is difficult to see why his employment did not end. He was not discharged in violation of any provision of the civil service provisions of the charter, but the term of his employment of office expired by the law of its creation.”

The same has been declared to be the law in Massachusetts (*Smith v. Mayor of Haverhill*, 187 Mass., 323; *Robertson v. Coughlin*, 196 Mass., 539; *Lahar v. Eldridge*, 190 Mass., 504), and in Illinois (*McNeill v. City of Chicago*, 93 Ill. App., 124; *Stoll v. City of Chicago*, 98 Ill. App., 105); in Texas (*City of Houston v. Mahoney*, 36 Tex. Civ. App., 45); in New Jersey (*McKenzie v. Elliott*, 72 Atl. Rep., 47 [N.J.]), and in New York (*Matter of Tiffany*, 179 N. Y., 445).

If it were conceded that the civil service act by its provisions converted the terms of office of all time incumbents into civil service positions which the incumbent would continue to hold indefinitely thereafter, subject to the non-competitive examination mentioned in Section 10, the relators in this case would find their status in nowise improved. The two year terms for which they were elected on January 1st, 1912, expired at midnight, December 31st, 1913, and when the new law took effect January 1st, 1914, they were not incumbents of any public office or position at all and the section (10) invoked could be of no assistance to them.

It is suggested by way of avoidance of this difficulty that, under the law of Ohio, the relators held over until their successors were appointed and qualified. The successors of the relators, as appears from the minutes of the city council, were elected at a session of the council which began at 10 A. M., January 1st, 1914. These were all emergency appointments, made in conformity to the new act and good only until notice could be given the civil

1914.]

State, ex rel, v. Schneller.

service commissioners to furnish an eligible list from which to select more permanent employees. From midnight, December 31st, 1913, up to some time before noon on January 1st, 1914, the relators assert they were the lawful incumbents of the positions under the rule which extends a term of office beyond the chronological point at which it expires up to the exact moment of time at which successor is elected and qualified.

The Constitution of Ohio, Article XVII, Section 2, provides that elective officers shall hold over after their terms have expired until their successors have been elected and qualified, and General Code, Section 8, makes the same provision as to all those holding offices of public trust, and it is claimed in argument, supported with some show of authority (see *McQuillin on Municipal Corporations*, Section 487), that the same rule applies to all positions of public employment. Even if this claim be well founded, which the court is by no means inclined to concede, the real question would still remain, namely, did the General Assembly intend the civil service act to apply, in the respect claimed, to a group of subordinate, clerical, and ministerial positions of which, under the rule of law stated, the former holders remained incumbents during the half day or thereabout necessary for the election of their successors? Were the relators, under these circumstances, "incumbents" as meant by the word used in the third paragraph of Section 10 of the new law?

The court is of the opinion that the relators were not such incumbents. Time is not reckoned in such matters hour by hour by the clock, but day by day, month by month, or year by year according as the term is designated in the statute creating it. As a matter of public convenience and sometimes of necessity, incumbents of positions upon whom public duties of importance are imposed must hold over until some one can be legally assigned to take over such duties, but this rule was not intended for the benefit of public employees and officeholders. It was never intended that the officeholder whose statutory term had expired should be given another term of office because a new law which made special provision for incumbents of unexpired terms happened to come into effect for the first time during

the few hours during which he held over until his successor could be appointed. This view of the matter is supported by the reasoning of the decisions already cited and in several of them it is expressly so decided: *Smith v. Mayor of Haverhill*, 187 Mass., 323; *Robertson v. Coughlin*, 196 Mass., 539; *Lahar v. Eldridge*, 190 Mass., 504; *Rodrigue v. Rogers*, 4 Cal. App., 257; *City of Houston v. Mahoney*, 36 Tex. Civ. App., 45; *Stoll v. City of Chicago*, 98 Ill. App., 105; *McNeill v. City of Chicago*, 93 Ill. App., 124; *McKenzie v. Elliott*, 72 Atl. Rep., 47 (N.J.); *Matter of Tiffany*, 179 N. Y., 455.

From what has already been said, it is apparent that the application for a writ of mandamus must be denied and the case dismissed, and it will be so ordered.

In deciding this case it has not been necessary to pass on the constitutionality of the section of the civil service act challenged by counsel for the defendant. It is a well established rule that a court shall accept without question the constitutionality of an act of the General Assembly unless it is essential to the determination of the case before it to pass upon its validity. Since the present action was begun, another suit involving the constitutionality of the civil service act has been filed in this court and it is probable that there will be a number of such suits filed hereafter. The court deems it improper therefor under the circumstances to undertake to decide a question not necessary to a final determination of the case at bar.

1914.]

Cedar Point Resort Co. v. Nuhn.

**VALUATION OF PERSONAL PROPERTY FOR PURPOSES
OF TAXATION.**

Common Pleas Court of Erie County.

CEDAR POINT RESORT COMPANY V. C. H. NUHN, TREASURER, ET AL.

Decided, 1913.

*Taxation—Method of Valuing Personal Property—Profits Derived from
its Use Not a Factor to be Considered—Sections 5388, 5404 and 5405.*

The value of personal property for the purpose of taxation, whether belonging to an individual or a corporation, should be based on its true value as property, and not on its value as a unit or going concern and with reference to the use made of it by the owner and profit derived therefrom.

King & Ramsey, for plaintiff.*Clarence D. Laylin*, Assistant Attorney-General, contra.

STAHL, J.

This is an action to restrain the treasurer from collecting certain taxes and to declare void a certain portion of the assessment placed upon the personal property of the plaintiff, the Cedar Point Resort Company. The action originally was begun against the treasurer and auditor of Erie county, and subsequently the Tax Commission of Ohio was made a party defendant.

By the petition and the answers of the several defendants and the reply and the evidence and agreed statement of facts it is admitted that the plaintiff is a corporation engaged in conducting a summer resort in Erie county; that it owns about 600 acres of land bordering upon Lake Erie; that about 112 acres of such real estate is located in the township of Huron, and the balance in the city of Sandusky; that said real estate is assessed for taxation at the sum of \$344.510. It is further admitted that the officers of the corporation made a return to the auditor of Erie county of the property of said corporation in the year 1912, and in said return fixed the value of the personal property at a figure which the plaintiff believed such personal property was worth.

But the auditor of Erie county, not being satisfied with said valuation, fixed a valuation thereon of \$181,000, and that thereafter the plaintiff appealed to the Tax Commission of Ohio, and that upon said appeal the Tax Commission increased such value placed upon said property to \$201,490. The plaintiff thereupon tendered to the treasurer of Erie county \$646.29, being the amount the plaintiff claims can lawfully be assessed against such personal property, and the treasurer refused to receive the same, claiming that the tax due upon said personal property is \$2,125.-79.

The plaintiff claims in its petition that the auditor arbitrarily fixed the value that he placed upon said personal property, and that the Tax Commission did so without observing the true rule of valuation.

It is admitted that the auditor, in determining such valuation, ascertained the market value of the issued capital stock of said company, and that he took this sum as the total value of the company's plant or resort, and that from this he subtracted the value of such real estate as assessed for taxation and assumed that the difference was the value of the personal property.

It is admitted that the Tax Commission determined from the books of the company that the net income of the company for one or two years prior to the time in question was \$55,012, and figuring that the company was entitled to earn 10 per cent. upon its investment, it assumed that by reason of this system of reasoning that the value of the plant or resort was \$550,000 and it thereupon subtracted the assessed value of the real estate from this sum, thereby reaching what it claimed was the value of the personal property.

And it is further admitted by the plaintiff that the net income of the plant was such sum of \$55,012. and that the capital stock issued is \$1,000,000 fully paid up.

The court understood that it also was agreed and admitted upon the trial that the personal property of the plaintiff, if considered separate from its use by the company, and as separate and distinct articles of property, was worth on the day preceding the second Monday in April, of 1912, the sum of \$60,-

1914.]

Cedar Point Resort Co. v. Nuhn.

970.75; but counsel for the defendant insisting that their understanding was that that only applied to tangible personal property, and a rehearing being had, it is shown thereon that there was cash in bank, in addition to such tangible property, the sum of \$74.27; and the court finds that that sum was the only asset of the company, other than said tangible property covered by said agreement. So that on that day the personal property of the company, if estimated as the plaintiff claims it should be estimated, was worth \$61,045.90.

The defendant claims that the property of the Cedar Point Resort Company should be assessed as a unit or as a going concern, and the value of the personal property ascertained and determined in connection with its use by the company; and, therefore, that the method pursued by the auditor and the Tax Commission was correct; and this claim is based upon Sections 5404, 5405, and 5406 of the General Code.

The plaintiff claims this is an incorrect method, and that under the law of Ohio the value of plaintiff's personal property is to be determined merely as such property at its true value in money without reference to the use made of it by the plaintiff company.

If the plaintiff is correct, the injunction should be sustained. If it is not correct, the injunction must be dissolved.

An elaborate and very able brief has been presented to the court by the Attorney-General in support of the contention of the defendants, and it has been forcefully argued by counsel for the plaintiff in support of plaintiff's contention.

Article XII, Section 2, of the Constitution of Ohio, provides:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."

To secure and bring about this provision of the Constitution of Ohio, various and sundry acts have finally been incorporated in the General Code of Ohio.

Sections 5366 to 5403 of the General Code constitute a chapter relative to the listing of personal property by individuals, and

Sections 5304 and 5414 constitute a chapter relative to the listing of general corporations and banks. But all these sections being sections relative to the general subject of taxation, must be looked to and construed together so as to form an harmonious whole.

It was said by the Supreme Court in the case of *City of Cincinnati v. Connor*, 55 O. S., 89:

“It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious, in its several parts. And where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible be given a construction which will bring them in harmony with that policy.”

Section 5388, being one of the sections in the chapter relative to the listing of personal property by individuals, provides:

“Sec. 5388. In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where it may then be. If there is no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as is believed could be obtained therefor, in money, at such time and place.”

Section 5404 provides:

“The president, secretary and principal accounting officers of every incorporated company, except banking and other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by the law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company or corporation within the state, at the actual value in money.”

Section 5405 provides:

“Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount hereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the

1914.]

Cedar Point Resort Co. v. Nuhn.

value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district."

It is claimed on behalf of the defendants that Sections 5404 and 5405 authorize and require the listing of such property by a corporation as a unit and in the manner done by the defendants, because of the fact it is a corporation. It is further claimed and asserted that this is proper under Section 5388 without reference to Sections 5404 and 5405; and it is said that this is the true construction of Section 5388 upon the authority of the case of *State, ex rel, etc., v. Holliday*, 61 O. S., 352.

That was an action in which the question of the right of the state to assess certain telephone instruments of the Bell Telephone Company was involved. The telephone company did not sell these instruments, but rented them to the subscribers, and the state claimed the right to assess them against the company at a peculiar value on account of all the facts connected with their use, and this claim of the state was sustained in that case.

It has been many times held that the opinion in each case, and the law as laid down therein, must be viewed in the light of the facts of that particular case. And it is my opinion that, so viewing that case, it can not be held to support the contention or claims of the defendants. If the defendants' claims based upon this decision could be sustained, then if two men, forming a partnership in the city of Sandusky, should purchase a number of automobiles, and should with them conduct an auto of taxicab livery, and should by reason of attention to business and courteous treatment of their patrons, develop a large busi-

ness, thereby practically controlling such industry in this city, and by reason of those facts annually make an exceedingly large profit and income, then it would be proper to assess such automobiles, not with reference to the distinct value of such machines, but with reference to the business conducted by such partnership and the amount of the income received in such business. If that claim based upon that decision be correct, then, if two men in a village were engaged in the draying business, owning property exactly of the same character and quality, and one of them should obtain a larger proportion of the business of the community than the other, and thereby make a larger amount of money annually than the other, then the valuation to be placed upon his dray would be greater than that placed upon the dray of his competitor. It is clear that such a procedure would violate the plain provisions of the statute. That indeed would be a tax upon a man's industry and his income. It is clear to my mind, therefore, that Section 5388 will not sustain the contention claimed for it by the attorneys for the defendants with reference to the method of listing and valuing the property of individuals.

But it is claimed, and this is perhaps the principal contention of the defendants, that Sections 5404 and 5405 do sustain this contention, because the plaintiff is a corporation, require this method of procedure. It having been determined that this method of procedure could not be used in assessing the property of an individual, let us now determine whether it is proper with reference to the personal property of a corporation? It seems to me that this question can be determined by a proper construction of these two sections, rather than by considering statements made by the Supreme Court in the construction of other statutes in cases that have heretofore been decided, however logical such statements may appear to be or however pertinent they may seem with reference to the question under consideration.

For instance, it is said by the judge rendering the opinion in the case of *State, ex rel, etc., v. Jones, Auditor*, 51 O. S., 511:

"If the market value—perhaps the closest approximation to the true value in money—of the corporation value as a whole, were inquired into, the market value of the capital stock would

1914.]

Cedar Point Resort Co. v. Nuhn.

become a controlling factor in fixing the value of the property. Should all of the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augmented and may keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well understood relation between the two, that not only is the value of the stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock."

And it is claimed that this statement of the judge supports the method adopted by the auditor, in fixing the value which he fixed upon this property; and if the value of the capital stock is a reflex of the value of the corporate property, it would be proper that this would be a true method in determining the value of the property as an entity.

It is, however, to be noted that this case arose under another section of the statutes, and with reference to an entirely different character of property, and an entirely different corporation, than the property and corporation here involved. What would be the effect of that method of determining the value of the personal property of a corporation if applied to all corporations generally? Let us suppose that a corporation engaged in the manufacturing business has real estate and personal property actively used in its daily business. Under the claim made by the defendants it would be the duty of the auditor to fix the value of this plant as an entity; and let us suppose that the value of such plant is the sum of \$100,000; when so estimated. Let us suppose that the corporation has real estate which is not used in its daily operations of the value and which is assessed for taxation at \$100,000. And let us suppose that the capital stock is of the market value of \$200,000. The whole property of the corporation is \$200,000, and if the value of the one is the reflex value of the other, then the value of the capital stock is fixed by

reason that all of the property, its plant and the real estate, valued at \$100,000 equals \$200,000.

Now, if the auditor is authorized to fix the value of the plant as an entity at \$200,000, because the corporate stock is worth \$200,000, and from this amount subtract the value of the real estate used in its daily business, and assess the difference against the personal property used in connection with its plant, then the corporation in that instance would be required to pay double taxation to the extent that the real estate not used in its daily business entered into the matter of fixing the value of the capital stock. The Legislature never intended that this statute should receive a construction that would permit that character of procedure.

But it is asserted that inasmuch as Section 5404 required the corporation to list for taxation all of the personal property thereof, and all the real estate necessary to the daily operations of the company, together with the moneys and credits of such corporation, and because Section 5405 requires the auditor to ascertain and deduct from such aggregate sum so found the value as assessed for taxation of any real estate included in the return, and to distribute the remainder among the different taxing districts in the county, that, therefore, it necessarily follows that the auditor must determine the value of such plant as a unit, because, as is said in the able brief of the Attorney-General:

“If all the auditor had to do was to value and assess each article of personal property possessed by the corporation according to the rules set down in the general taxation statutes for the assessment of personal property, then there would be nothing to apportion. Each separate article of personal property would be separately listed and assessed in the taxing district in which it had its taxable situs. There would be no over-plus to be apportioned among possible taxing districts.”

In my opinion, a true construction and correct interpretation of these two sections do not sustain this contention.

Section 5371 provides where personal property shall be listed for taxation. The purpose of that section is to designate that certain cities, townships or taxing districts shall have the benefit

1914.]

Cedar Point Resort Co. v. Nuhn.

for the purposes of taxation of certain property; and the purpose of the provisions of these two sections is not to designate or provide a method of arriving at the value of the property of a corporation, but simply to secure a distribution of the amount levied against a corporation among the proper taxing districts. This construction of the Attorney-General leaves out of consideration one very important and decisive fact, the amount so found, after deducting the value of the real estate returned in the report, is not to be distributed among the taxing districts in proportion to the value of such real estate as listed for taxation. It is to be distributed among such taxing districts in proportion to the value of the real estate and fixed property included in the return. The question arises at once, what is meant by the term "fixed property"? In the judgment of the court it simply means the personal property that has its fixed situs in the several taxing districts.

Sections 5404 and 5405, as they now stand in the General Code of Ohio read slightly different than they did when the codification of the statutes were made by the codification commissioners, the section having been amended in Vol. 102 O. L., 60; but there is no change in the meaning of the statute or in its proper application or effect. But a better understanding of these two sections can be had by tracing the history of them. These two sections, and Section 5406, constituted one section in the Revised Statutes of 1880, and were divided into three sections by the codification commissioners. Section 2744 of the Revised Statutes did not provide, as is done in Section 5405 of the General Code, that the auditor should from the aggregate value of the property of the corporation subtract the value of the real estate named in the return, but it provided:

"In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of such property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, city, village, or township."

It is clear to the mind of the court that the statutes require the officer of a corporation in his return to show the location of the various items of personal property which are susceptible of a fixed situs, as is shown or indicated by Section 5371 to which I have referred. But as the corporation might have property which is not subject to a fixed situs—assets, such as moneys and credits—the Legislature intended that the various taxing districts in which the active property of the corporation was located, and which it presumed aided in the creation of the credits and the moneys of the corporation, should have its fair share of the benefit of such moneys, credits, etc.

It is true that in the revision of 1880 in Section 2744, and indeed in the language of Section 5405 as it stood before its recent amendment, reference was made to the movable property of a corporation. Nevertheless it is clear that reference was had to all property not having a fixed situs. These sections of the statutes were originally different sections of an act of the Legislature which was passed and took effect April 5, 1859, Vol. 56 O. L., 175, and found in S. & C., Vol. 2, 1438. As Section 5405 appeared in that act it read,

“The president, secretary, or principle accounting officer of every canal or slackwater navigation company, railroad company, turn-pike company, plank road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for in this act,”

shall make out the return in substantially the same way as was provided in Section 2744 of the Revised Statutes. It is made clear in the original act, taken in consideration with the development of the country at that time, that the Legislature intended that the property of railroads, together with all the personal property that had a fixed situs within the definition laid down in that particular section at a particular place should be credited to the particular place, and that the value of the property which had no fixed situs should be ascertained and divided among the various taxing districts according to such valuation and the valuation of the real estate therein named. So that it is clear to the

1914.]

Cedar Point Resort Co. v. Nuhn.

court that these sections of the statute do not furnish any guide whatever to the method of arriving at the value of the property merely because it is the property of a corporation, and that it is only the purpose to secure proper distribution among the taxing districts; because, as I have suggested, the auditor is not to apportion according to the valuation of the real estate named in the return as it is listed for taxation, but according to the value of the real estate and fixed property named therein. The section requires that the officers shall name the taxing districts in which the various items of their personal property is located together with the value thereof. If, then; the value of the property of a corporation was to be taken as a whole, either by the method pursued by the auditor or by the Taxing Commission, it would be impossible for the auditor or the Taxing Commission to determine this vital thing which it is required to do in order to perform the duty of the auditor. On the other hand, the statutes specifically require that the officers of the corporation shall in their report name the taxing districts in which items of property are located, and fix the value thereof.

Now, it might be said, I realize, that if in a certain taxing district there was a distinct plant or manufacturing establishment of a corporation that its value would be determined by taking it as a unit. That, however, could not be claimed upon the authority of these two sections of the statute. It would have to be claimed upon the authority of the cases to which I have referred. As that is not the proper method to pursue as to the property of an individual, it likewise is not the proper method to pursue as to the property of a corporation.

I find nothing in the evidence, nor the agreed statement of facts in this case, to indicate that the property of the Cedar Point Resort Company has not a fixed market value. Certainly some of that property has a market value. Therefore, the contention of the state that the value thereof could not be arrived at in another method than that done by the auditor or the Taxing Commission is not sustained.

Upon the whole, it is my opinion that under the law of Ohio the property of the Cedar Point Resort Company must be listed for taxation at its true value in money without reference to the

fact that it is the property of a corporation, and without reference to its use by the corporation, and as it would be if it were the property of an individual. I don't think it is necessary for the court to give any consideration to the question raised in the briefs that the auditor had the right, or that it was the duty of the auditor, especially to fix the value if he believed the value named in the return was not correct. I don't believe that it is necessary for the court to give any consideration to the question as to whether a method of that character, or of that kind, would be constitutional; or that an act providing for that method of procedure would be constitutional. I think it enough to say that the court is very clearly of the opinion that the Legislature has not yet provided for adopting that method of taxation. The order of the court will be, that all of the assessment upon the personal property of the Cedar Point Resort Company in excess of \$61,045.90 will be declared void, and that it pay taxes at the regular and usual rate of taxation for the year 1912 upon that sum.

**SURETIES RELEASED BY ACTION PREJUDICIAL TO
THEIR RIGHTS.**

Common Pleas Court of Huron County.

WILLIAM T. HART V. C. W. MANAHAN ET AL. *

Decided, February 5, 1908.

Sureties on Injunction Bond—Released by Release of Levy—Depriving Them of Their Remedy by Subrogation.

Where further proceedings for recovery on a judgment are enjoined, and the original plaintiff thereafter, without the knowledge of the sureties on the injunction bond releases the levy by which he had obtained a lien upon a fund, he at the same time releases the sureties from liability to him on the injunction bond by reason of the fact that he has thereby deprived them of their remedy by subrogation against said fund.

* Affirmed by Circuit Court September 17, 1908.

1914.]

Hart v. Manahan et al.

Theodore Alvord and Malcolm Kelly, for plaintiff.

C. P. & L. W. Wickham and Ben B. Wickham, contra.

RICHARDS, J.

This action was brought for the purpose of recovering damages upon an injunction bond for \$4,500, given in the Common Pleas Court of Erie County, in an action then pending therein in which it was sought to restrain this plaintiff from prosecuting certain actions in the states of New York and New Jersey. A jury has been waived by the parties, and this case submitted to the court.

A history of this litigation is an interesting, if not very encouraging commentary on the uncertainty of the law. A brief statement of it will aid in understanding the issues in this case.

Wm. T. Hart brought suit in the Lucas county common pleas court against Julia S. Manahan and Betsey M. Russell, which action resulted in a judgment in his favor, in 1897, for \$3,199.26. That judgment was affirmed by the Circuit Court of Lucas County.

Thereupon Hart began proceedings upon said judgment in the courts of New Jersey and New York, in an attempt to collect the amount of the judgment, and in the case in New York obtained a levy by means of an attachment and process of garnishment upon a claim for \$2,300, due from the Mutual Life Insurance Company to Julia S. Manahan.

Shortly thereafter Julia S. Manahan began proceedings in the Court of Common Pleas of Erie County to enjoin Hart from prosecuting said actions in New York and New Jersey. It was in this last action that the bond on which this suit is based was executed, and the defendants herein were the sureties on that bond. The condition of the bond is in substance that if said Julia S. Manahan shall pay to said William T. Hart such damages as he may sustain, if it shall be afterwards decided that said injunction was wrongfully granted, then the obligation to be void; otherwise to remain in full force.

In the common pleas court, the injunction, on final hearing on the merits, was dissolved except as to certain interest, and

Julia S. Manahan, the plaintiff therein, appealed. In the circuit court the decision on the merits was in favor of Julia S. Manahan, the court adjudging that William T. Hart be perpetually enjoined from collecting or attempting to collect by execution, action, proceeding or otherwise, in the states of New York, New Jersey, Ohio, or elsewhere, any part of said judgment and from further prosecuting said actions in New York and New Jersey. *Manahan v. Hart*, 2 C.C.(N.S.), 606.

Hart prosecuted error to the Supreme Court of Ohio, which court reversed the judgment below, dissolved the injunction, and rendered a final judgment in favor of Hart. *Hart v. Manahan*, 70 Ohio St., 189.

After the decision of the circuit court, making the injunction perpetual, the case in New York was disposed of by an entry on April 20th, 1903, in the supreme court of that state, which recites that by the consent of the attorneys for all the parties, it is ordered that the attachment be vacated and set aside.

Hart, being now unable to collect of the original judgment debtors, who have become insolvent, seeks by this action to hold the sureties on the injunction bond.

The discussion of the legal questions in this case has been characterized by much earnestness and ability. It is not found necessary, in the view which the court takes, to determine all of the matters which have been argued.

Whether the liability of sureties on an injunction bond may be limited by the terms of the order of injunction when the temporary injunction is granted in the common pleas court, and whether that liability ceased at the time of the decision of the common pleas court, or of the circuit court making the injunction perpetual, are interesting questions, not necessary to be now decided. I cite, however, *Williams v. Baker*, 13 C. C., 500 (7 C. D., 515).

The decision which I have reached is based on other aspects of the case which seem to compel the conclusion to which I have arrived.

The plaintiff, by virtue of his action in the New York court, had a lien by way of attachment on \$2,300 due to Julia S. Mana-

1914.]

Hart v. Manahan et al.

han, one of the principal debtors in his original judgment. That levy he voluntarily released, the language of the record of the court being that it was entered "by consent of the attorneys for all parties."

It is urged that the case was dismissed by reason of the failure of Hart to give security for costs, and that for him to have given security for costs would have been a violation of the injunction. It must, however, be remembered that the record of the Supreme Court of New York imports absolute verity, and it appearing by that record that the attachment was vacated and set aside by consent, the fact is conclusively determined and can not be questioned in this collateral way.

As a result of the release of that levy, the fund of \$2,300 held thereby was paid to Julia S. Manahan, the principal debtor of W. T. Hart, or became dissipated and lost. That voluntary release was without the consent of the sureties, who are the defendants herein, and certainly resulted to their prejudice.

Many cases have been cited by counsel, and much ingenuity has been shown in determining the force and effect of the decisions as to the consequences following from the release of that fund.

In *Boynton v. Phelps*, 52 Ill., 210, upon which so much reliance is placed by the plaintiff, it appears, as stated in the course of the opinion, on page 217, that the creditor had two remedies, one on the forthcoming bond, and one on the injunction bond. The court held he had the right to obtain satisfaction on the injunction bond. Manifestly, if he collected his judgment out of the sureties on the injunction bond, they would be subrogated in equity to his rights in the forthcoming bond for the goods levied on.

In the case at bar, the creditor, by voluntarily dismissing the action in the Supreme Court of New York, has released the \$2,300 held by garnishment proceedings, and thereby forever prevented the sureties on the injunction bond from ever obtaining the benefit of subrogation if they should pay the debt.

In this respect, the case of *Boynton v. Phelps*, *supra*, is materially different from the case at bar. The very case of *Boyn-*

ton v. Phelps recognizes, in the first proposition of the syllabus the general doctrine that if the principal debtor makes an agreement without the consent of the surety which is prejudicial to the surety, he will thereby be discharged. Of course such a result would as certainly follow if the agreement prejudicial to the surety were made by the creditor himself.

Whether, in other respects, *Boynton v. Phelps*, 52 Ill., 210, can be reconciled with 54 O. S., 98, and 44 O. S., 221, we need not stop to inquire.

The case at bar seems to be on all fours with *Maquoketa v. Willey*, 35 Iowa, 323, 329. In that case it was held that while the law does not require the party to institute a suit against the debtor, yet having done so, and acquired a hold on property therein, as by levy of attachment or execution, he can not afterwards in any manner relinquish the same to the prejudice of the surety, and if he does so, the surety will be discharged to an extent corresponding with its value. This decision is in accordance with the general doctrine that the surety is entitled to every remedy which the creditor had.

See *Sheldon on Subrogation*, Sections 119, 122; *Dixon on Subrogation*, 59; 3 Ohio, 281; 40 Ohio State, 446.

The substantial damages which have been sustained by the plaintiff, arise from the release, by him, through his New York attorneys, of the levy in the attachment case. They do not arise from the wrongful granting of the injunction.

It is true, however, that this plaintiff is entitled to nominal damages, because the injunction was wrongfully granted, but under the circumstances of the case, nothing more than nominal damages.

Having released a fund upon which he had a lien by levy of garnishment, he can not thereafter hold the sureties in the injunction bond for the same. His act, or his attorney's act, for which he is responsible, has deprived these sureties of all remedy by way of subrogation, and it would be inequitable for him to require the sureties to make good to him the amount of a fund so released.

A judgment may be entered for the plaintiff for nominal damages.

1914.]

In re Will of Reckard.

PUBLICATION NOT AN ESSENTIAL PART OF A WILL.

Common Pleas Court of Washington County.

IN RE WILL OF JOSEPH L. RECKARD, DECEASED.

Decided, January 19, 1914.

Wills—Publication of, Not Required by Statute—Witnesses Need Not Know that the Document is a Will—Proof that the Testator Knew the Nature of the Instrument—Attestation Clause—Acknowledgment and Publication Distinguished.

1. The statute of Ohio prescribing the formalities necessary to be observed in making a valid last will and testament does not contain any requirement that the will be published, and therefore no publication by the party making it is necessary.
2. Publication not being specifically required by statute a witness in order to "attest" the will need not know either the contents of the instrument nor even that it is in fact a will.
3. In order to probate the will the one offering it must prove that testator knew the nature of the instrument and realized that it was his last will and testament, but it is not necessary that this fact be known to or proved by the attesting and subscribing witnesses or either of them. It may be shown by any competent evidence.
4. An attestation clause, containing affirmation that the will was "published," etc., though advantageous, is no essential part of a will, not being required by statute, and the instrument may be well executed without containing any such clause.
5. "Acknowledgment" and "publication" distinguished and *Kehl v. Fuchter*, 56 Ohio St., 424, and other cases commented on.

Hancock & Noll, for appellants.

FOLLETT, J.

Appeal from probate court, which refused to probate will.

On August 25th, application was made to the Probate Court of Washington County for the probate of the will of Joseph L. Reckard, who died on March 10th, 1913. Probate was there refused upon the ground that one of the two witnesses thereto was not informed, and did not know, at the time he subscribed his name to the instrument, that it was a will. Upon the appeal

to this court the evidence disclosed the same facts as in the court below, namely, that both witnesses saw the testator sign the instrument at the end thereof, and subscribed in his presence and in the presence of each other. The witnesses were competent and the testator was of sound mind and memory. The sole question is therefore whether or not, in order that the will be properly "attested" in accordance with the laws of this state the witnesses must know that the instrument is a will.

It is unquestionably true that the witnesses need not know the contents of the instrument but it is contended that they must at least know that it is a will. Whether or not this contention is correct depends upon the requirements of the statute which details the formalities necessary to be observed in the execution of a valid will. Section 10505 of the General Code provides:

"Except nuncupative wills, every last will and testament must be in writing, but may be handwritten or typewritten. Such will must be signed at the end by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge it."

In spite of the syllabus of the case of *Kehl v. Fuchter*, 56 O. S., 424, which is to be taken as the decision of the court, but which is to be considered and applied in the light of the evidence and as limited thereby, it may be properly affirmed that none of the requirements of the statute include knowledge on the part of the witnesses that the instrument is a will unless it be the requirement that the will be "attested." Is the requirement found in the use of that word?

The word was first used in this connection in the Statute of Frauds (29 Car. 1103), which first made it essential that there be witnesses to a will. (See 10 Ohio, 462 at 464, and note in Cent. Ed.) It was adopted in the statute of the commonwealth of Massachusetts and from that statute followed in the one enacted in Ohio (1804 P. L., 173). Twenty years later it was

1914.]

In re Will of Reckard.

first provided in Ohio that the witnesses must have seen the testator subscribe his name or heard him acknowledge his signature. (22 O. S., 119, Par. 2.)

As stated by the court in the case of *Osborn v. Cook et al*, 11 Cushing, 532:

“It is not easy to trace the origin of the belief which, we are aware, is quite prevalent, of the necessity of some formal publication of a will, or declaration by the testator that the instrument is his last will and testament; but, as a question of principle or of authority, it is now settled, that such publication or declaration is unnecessary.” Unnecessary, that is, unless specifically required by statute. (40 Cyc., 1117; 30 Am. & Eng. Encl., 2d Ed., 587.)

The probable origin of the belief is in the decision of Lord Hardwicke in *Rose v. Ewer*, 3 Atk., 156, who apparently attempted to legislate the requirement into the statute because of his strong conviction of its value. In *Moodie v. Reid* (7 Taunt., 361; 2 E. C. L., 397), Gibbs, C. J., expressed a decided opinion that the publication was never an essential part of a valid will, either by custom at common law, or by the statutes of Hen. VIII nor Car. 11. The latter view became the settled law of England, the courts holding that it is not a question of what *ought to be* but what *is*. (*Wright v. Wright*, 7 Bing., 457; 20 E. C. L., 107).

But, while the misconception was early corrected and has entirely disappeared in England, we find numerous instances in the United States where it has entered into decisions and still exists in a somewhat indefinite way not only in other states but also in Ohio. The misconception seems to us to exist because of remarks made—often purely as *obiter dicta*—by the court in the decision of one case being misapplied in another from a lack of clear and careful reasoning. In a very early case in Massachusetts (*Sweet et al v. Boardman* [1804], 1 Mass., 257), in which the evidence disclosed the fact that the testator did not himself know the nature of the instrument which he was signing, in one of the three brief opinions, Sewall, J. says:

"I do not think that any particular ceremony of publication is necessary, or material, but the deceased ought at least to have known and understood that he was executing his will. There is no evidence that he had any idea of that being the fact; but, as far as the evidence goes, it proves the contrary."

In the same case Sedgwick, J., says:

"The statute does not expressly require publication, nor is there anything to be found in the books directly in point on the subject. But in my opinion, it ought at least to appear that the person knew he was executing his will, and *that he communicated that fact to those who were called to attest the same as witnesses*; and this is necessary to prevent imposition."
* * * [The italics are our own.]

It was fifty years before the doctrine contained in this apparently superfluous observation of the court, and appearing in the latter part of the remarks of Judge Sedgwick, was repudiated by the Supreme Court of that state. A case similar to the one before us was presented to that court about 1856, namely, *Osborn v. Cook et al*, 11 Cushing. 532, and this gave the court its first opportunity to set at rest the doubt which existed in that state as to the necessity for knowledge by the witnesses of the nature of the instrument which they were called upon to witness, and the court in clear and emphatic terms states the law as follows:

"We think the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents, or of its nature, is in terms required. The Legislature have prescribed certain solemnities, to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses, what is in the will, or even that it is a will."

This last case was followed and represents the now settled law of Massachusetts.

But during the half century, within which the case of *Sweet v. Boardman* was frequently cited and the opinions of the judges widely quoted as the law of Massachusetts, many of the courts

1914.]

In re Will of Reckard.

throughout the country were misled, and thus the effect of the original error of Lord Hardwicke was perpetuated, and it will doubtless be many years before its influence ceases to exist. Notable among such decisions of that half century is that in the case of *Swift v. Wiley* (1840), 1 B. Monroe, 114 (Ky.); and the opinion of Robertson, C. J., has been extensively quoted throughout the country, as for instance in *In Re Ludwig's Estate* (Minn.) 81 N. W., 758, and in Ohio in Rockel's Complete Ohio Probate Practice, Vol. 1, p. 940. It is with the hope of hastening a complete removal of the error in this country that the historical aspect of the question is so extensively dealt with in this opinion.

Chief Justice Robertson says:

"As the statute requires two witnesses to the publication of a will disposing of real estate, the paper subscribed by the witnesses must, of course, be completed as a legal will at the time of the attestation. To attest the publication of a paper as the last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses; subscription is the act of the hand. The one is mental, the other mechanical; and to attest the will is to know that it is published as such, and to certify the facts required to constitute an actual and legal publication, but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation, in fact, without subscription."

The reasoning of the learned jurist is correct and the conclusion reached by him is unquestioned if his premise be true, viz., that "*the statute requires two witnesses to the publication of the will*"; and if the statute require publication then and then only does "attestation" require a knowledge on the part of the witnesses that the instrument is in fact a will.

The decision of Chief Justice Robertson has been widely quoted and apparently much misunderstood, for the courts which have quoted the decision with approval have apparently wholly failed to observe that the basis for the holding is the requirement of the statute, and that the holding does not apply

in jurisdictions in which the statute does not specifically require a publication. Either the premise of the learned judge was wrong and his entire reasoning based on a misstatement, and the opinion therefore valueless, or else the decision has no application in our state where neither a publication nor an attestation thereof is required by statute, as he said was required by that in Kentucky. In either event the decision is of no weight in Ohio.

"Attest" is to bear witness to; to certify; to affirm to be true or genuine; to signify by subscription that the signer has witnessed the execution of the particular instrument." (Am. & Eng. Encl., Vol. 3, p. 274). "So, I conceive, the witnesses to a will bear witness to all that the statute requires *attesting* witnesses to *attest*, namely, that the signature was made or acknowledged in their presence." (*Id.* Foot-note 1.)

The whole question therefore is: Does the statute, as in New York and some other states, require publication as an essential part of the execution of a valid will? If so, then obviously no witness can truly "attest" the execution of a valid will unless he is informed that the paper is in fact a will. But publication is only necessary when expressly required by the statute (30 Am. & Eng. Encl., 587; 40 Cyc., 1117; *Schouler on Wills* [2d Ed.], p. 334, Section 326). Therefore we easily reach the conclusion that in Ohio, where no publication is expressly required by statute, none is necessary to the execution of a valid will, and so no one but the testator need know that the instrument is a will. And, if the Legislature has not seen fit to so require, it is not the province or right of the court to legislate for it. There are many reasons why a publication is an unwise requirement (*Swineburne on Wills*, 27). But, even if there were none, the courts would be powerless to add a requirement which does not either by common law or statute exist.

One must moreover carefully distinguish between a "publication" and an "acknowledgment." The latter is in Ohio essential when the witness does not see the testator subscribe, and then only. This distinction has not always been properly ob-

1914.]

In re Will of Reckard.

served (40 Cyc., 1120; 8 O. Dec., 47; 8 O. N.P.[N.S.], 591; 2 O N.P.[N.S.], 199). One should remember also that an attestation clause though advantageous, is no essential part of a will unless required by a statute, and that the instrument may be well executed without it (*Id.*, Section 346, p. 367; 40 Cyc., 1125). Such a clause is almost invariably used, including the word "published," and this may have something to do with the prevalent belief that publication is necessary.

In Ohio the case of *Kyle v. Fuchter et al*, 56 Ohio St., 424, seems to have cast a doubt upon the proper construction of Section 10505. In that case the witness did not see testator subscribe, did not see the signature on the paper nor was he told by any one that it was there. He was wholly unable to "attest" an essential requirement, namely, that testator subscribed the will. He neither saw him subscribe or heard him acknowledge it (2 O. N.P.[N.S.], 195). The syllabus contains the unfortunate statement to the effect that "one essential * * * is that it shall have been acknowledged by the maker as his will, and his signature acknowledged, * * * " but the opinion does not warrant such statement and we do not for a moment believe that the able court ever intended to employ that unfortunate phraseology, but if we are wrong in this it is at least certain that no such acknowledgment is necessary when the witnesses saw the testator subscribe (8 O. Dec., 47). The court nowhere says that the will must be "published," but only that where the witness did not see the testator subscribe, the *will* must be acknowledged as well as the *signature*.

With even this doctrine we respectfully disagree, for the acknowledgment of the signature is a mere substitute for the observation of the witness of its subscription, and we believe that, as in Massachusetts, the court will at the first opportunity remove the existing doubt by the use of language which will not be misconstrued. (See the able opinion of Geiger, J., in 8 O. N.P.[N.S.], 591.) True, the testator must know that it is a will and such fact must be established by the evidence in some way, but this does not require that the subscribing witness know that it is a will.

One eminent authority cites 42 W. L. B., 273, as also casting doubt in a similar way. We do not so consider it. The case of *Tims v. Tims et al*, 14 C.C.(N.S.), 273, is directly opposed to the view of this court, and with all due respect to that court we find no sufficient reason for following its decision.

As stated in *Allen v. Griffen*, 35 N. W., 21 (Wis.):

“This is a very old question both in England and this country, and with all due respect for the learning and ability of counsel for the contestants, we think it very clear that the great weight of authority is against the claim made by counsel.”

(See opinion in this case for further reasoning and for citation of authorities.)

The appeal will therefore be granted, and the paper writing ordered to be probated as the last will and testament of Joseph L. Reckard, deceased. Judgment may be taken accordingly.

DAMAGES FOR EROSION OF BANKS OF COUNTY DITCH.

Common Pleas Court of Hamilton County.

GEORGE HAHN V. THE BOARD OF COUNTY COMMISSIONERS OF
HAMILTON COUNTY.*

Decided, May 4, 1912.

Ditches—Damages to an Abutting Owner on Account of Erosion of Banks of a County Ditch—Basis Upon Such a Recovery May be Had—Issue Must be Raised Ex Contractu, Not Ex Delicto—Pleading—Torts.

- 1 Where a strip of ground of specified width and extending through a farm is acquired by the county for ditch purposes, the fact that the grantor of the strip covenanted to hold the county “free and harmless from any and all claims to damages to his remaining property resulting from the use to be made of said strip,” does not estop a successor in title from maintaining an action for damages on account of erosion of the banks of the ditch much beyond the line of the strip of land acquired.

*Affirmed without opinion, *County Commissioners v. Hahn*, 89 Ohio State, —.

1914.]

Hahn v. County Commissioners.

2. When the authorities duly constructed a ditch on land acquired for that purpose, and land each side thereof is destroyed by erosion the public is liable if such land has become a part of the ditch—and used as such—but otherwise if such land has been destroyed and not thus used; in the former case it is a taking as under an implied contract; in the latter a destruction *ex delicto*.

Alfred B. Benedict and Dudley P. Wayne, for plaintiff cited: *Article I, Section XIX*, Constitution of Ohio; *Longworth v. Cin'ti*, 48 O. S., 637; *Marsh v. Fulton Co.*, 10 Wall. (77 U. S.), 676-684; *Louisiana v. Wood*, 102 U. S., 294, at 299; *Logan Co. Nat. Bank v. Townsend*, 139 U. S., 67, at 75; *Chapman v. County of Douglas*, 107 U. S., 348; *U. S. v. Russell*, 13 Wall. (80 U. S.), 623; *Butler v. Comrs. of Neosho Co.*, 15 Kan., 178; *U. S. v. Great Falls Co.*, 112 U. S., 645; *Pumelly v. Green Bay Co.*, 13 Wall. (80 U. S.), 166; *Newburg Petroleum Co. v. Weare*, 44 O. S., 604, at 612.

John V. Campbell, Assistant Prosecuting Attorney, for the defendants, cited: *Comrs. of Hamilton County v. Mighels*, 7 O. S., 110, at 118 and 119; *Volk v. Board of Education*, 72 O. S., 481 and 482; *Grimwood v. Comrs. Sumner Co.*, 23 O. S., 600; *Holden v. Wright*, 4 U. S., 235; *Railway v. Bosworth*, 46 O. S., 81, at 86.

DICKSON, J.

The plaintiff owns a farm. His predecessor in title conveyed by deed to Hamilton county, Ohio, for the purposes of a ditch a strip of land 40 feet wide and 1750 feet long through the farm. In the deed this predecessor in title covenanted that he would hold the county "free and harmless from any and all claims for damages to his remaining property resulting from the use made of said strip of said ground by said county, the same being for ditch purposes." The county built the ditch within the 40 foot strip. In time many feet of land on each side of the 40 foot strip have washed into the strip and away. Plaintiff claims in his pleadings that the land on each side of the ditch has been taken or appropriated by the county for the ditch, is now a part of the ditch and so used by the county; and he claims

the right to recover as damages the value of the land, for the reason it has been taken by the public for a public purpose and without compensation in money as under an implied contract.

The answer of the county is in effect a denial of any taking of land outside of the 40 foot strip, and a setting up of the above covenant releasing it from all damages.

Plaintiff demurs generally to the answer. This demurrer is also an attack upon the petition and its amendment.

Are the facts stated in the petitions sufficient in law as the basis of any claim against the county? Was the land outside the 40 foot strip taken or was it destroyed? If taken, the rules of contract obtain and damages will be allowed. Destruction not accompanied by use is not a taking and damages will be denied. A taking means by contract, express or implied. A destruction means by some unlawful act—tort.

The county had a right to use that 40 foot strip for a ditch. This follows from the purchase for a ditch and the release in the deed. This release as to use in this deed does not enlarge the county's rights. Under the law the county here is liable only for damages *ex contractu*, and not liable for carelessness—tort.

It is not necessary to find here whether the covenant as to use in the deed be personal or runs with the land. If the county used reasonable care in its purchase, and thus bought enough land for the ditch at that place, and the alleged damages have been caused by some carelessness of the county in its construction and its use, these damages arise from a tort and there has been no taking and the county is not liable.

If the county did not use reasonable care in its purchase and did not buy enough land for the ditch at that place, and the alleged damages have not been caused by any carelessness of the county in its construction and in its use, these damages arise from a contract and there has been a taking and the county is liable.

Did the county take by purchase enough land? If yes, it has not taken more, and need not pay. If no, it has taken more and must pay.

1914.]

Hahn v. County Commissioners.

Was the negligence of the county in the purchase or the use? If in the purchase, payment must be made. If in the use, no payment.

The county has a right to acquire land for a ditch. The ditch is the thing, and the county will not be permitted to buy too little land and then of necessity permanently destroy more land by an erosion; such a destruction is not necessarily a tort. It may be a taking. Was the land thus destroyed or taken necessary for the ditch? Is it now a part of the ditch? This is the test. If yes, it must be paid for. If not, not.

When one of the public suffers on account of the wrongful (illegal) act of the public, and this wrongful act does not benefit the public, such an one has no remedy. He as one of the public suffers for the public. He suffers in degree and does not suffer in a way different in kind. But when the public benefits by such an injury to such an one and the benefit be permanent, that is, the public chooses to keep the benefit, the public must pay.

No doubt the ditch could have been constructed within the 40 foot strip by means of walls, but usually these ditches made by the county are made where the land is of little value compared with the cost of walls.

Considering the facts stated, did the county use ordinary care when it bought only 40 feet, or should it have bought more? Are these strips of land outside of the 40 foot strip used as a part of the ditch? If yes, payment must be made.

The apparent difficulty here is not in the law, but in the application of the law to the facts. The facts pleaded raise the issue on *ex contractu*, and not *ex delicto*.

The demurrer will be overruled as to the petition and sustained as to the answer.

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CONDITIONAL ASSIGNMENT OF LIFE INSURANCE.
Superior Court of Cincinnati.

*The Postal Life Insurance Company v. Horace W. Harmeyer
and Carrie Schmidt, Administratrix of Adolph
F. Schmidt, Deceased.**
Decided, December 17, 1913.

*Life Insurance—Unwarranted Steps to Compel Payment of Proceeds of
Policy to One Holding a Conditional Assignment—Relief in Equity
Denied.*

1. When a party comes into a court of equity seeking relief which can only be granted by a court of equity it must appear that he has acted equitably with reference to the matter which he has brought into court; and if he has not, he will be relegated to such remedies as he may have at law.
2. Where it appears that the assignee of an insurance policy has by misstatements and unwarranted attacks upon the insurer compelled it to pay the proceeds of the policy into court and to interplead several defendants, the assignee can not take advantage of his position and disregard a provision of the policy which would bar him from recovery in a suit against the company itself.

Thos. L. Michie, for Harmeyer.

Frank H. Kunkel, for Carrie Schmidt, administratrix.

OPPENHEIMER, J.

On April 27th, 1896, the Provident Savings Life Assurance Society of New York issued its policy of insurance in the sum of \$5,000 upon the life of Adolph F. Schmidt. The policy contained the following condition:

“Any assignment of this policy must be in writing, and a duplicate thereof must be furnished the society. Any claim arising under an assignment shall be subject to satisfactory proof of insurable interest existing at the death of the insured, or at the date of such claim if prior thereto, and the society shall

➔ **Motion to dismiss appeal sustained, Postal Life Insurance Co. v. Harmeyer, 19 C.C.(N.S.),—; judgment affirmed, Harmeyer v. Insurance Co., 19 C.C.(N.S.),—.**

1914.]

Insurance Co. v. Harmeyer.

be liable to the assignee to the extent of that interest only; but the society will not assume any responsibility for the validity of an assignment."

The policy was payable to the estate of the insured. The annual premium of \$88.80 was paid by the insured from April, 1896, until April, 1910, when the policy was assigned to Horace W. Harmeyer by a contract which reads as follows:

"For value received I hereby assign and transfer unto Horace W. Harmeyer, No. 519 Main street, Room 208, Lincoln Inn Court, in the city of Cincinnati, State of Ohio, Policy of Insurance No. 76203 issued by the Provident Savings Life Assurance Society of New York upon the life of Adolph F. Schmidt of Cincinnati, Ohio, and duly reinsured in the Postal Life Insurance Company, all dividends, benefits and advantages to be had or derived therefrom, subject to the conditions of the said policy and to the rules and regulations of the company, and subject and subordinate to any indebtedness to the company.

"It is expressly agreed that before any payment shall be made by virtue of this assignment, satisfactory proofs of the insurable interest of the assignee shall be furnished to the company, and the company shall not be liable for any sum in excess of such insurable interest.

"Witness my hand and seal. at Cincinnati, Ohio, this 22nd day of April, 1911.

"(Signed) ADOLPH F. SCHMIDT."

By a supplementary agreement on the reverse side of the aforementioned assignment, the insured endeavored to have Horace W. Harmeyer designated as beneficiary under said policy, but the company refused to allow this to be done as Harmeyer had no insurable interest in the life of the insured. It is admitted by Harmeyer, and his correspondence corroborates this, that at the time when he received the policy from Schmidt he had absolutely no insurable interest in Schmidt's life, and Schmidt was not indebted to him in any sum whatsoever. He took the policy merely because, in his opinion, Schmidt was unwise in discontinuing it, and it was a profitable speculation for him to continue it in force.

The premiums on the policy, after the date of said assignment, were paid by Harmeyer until April of the present year, as was

also the interest on a loan of \$485, which the insured had obtained from the company on said policy while it was still in his possession. On July 26th, 1913, Adolph Schmidt died leaving a widow, Carrie Schmidt, who has since qualified as administratrix of his estate in the probate court of this county, and one minor child. Immediately after the death of the insured, Harmeyer presented his claim and furnished proofs of death to the Postal Life Insurance Company. The company requested him to furnish some evidence of his insurable interest, stating that, as he held only a conditional assignment, it was necessary for him to indicate either that he had such insurable interest, or that the decedent had been indebted to him in an amount equal to or greater than the amount due under the policy. A great deal of correspondence between the company and Harmeyer ensued, which, on Harmeyer's part, is in the opinion of the court decidedly unique. It consists largely of a refusal to comply with the request of the company, and of abuse of the company itself and of others whose names were not in any way involved in the transaction. The request made by the company was designated as "ridiculous," the names appended to communications from the company were burlesqued and corrupted, and the solvency of the company was attacked. Despite the assurance of the company that its delay in payment was due only to Harmeyer's refusal to furnish the necessary proofs and affidavits, and despite its assurance that the claim would be paid forthwith upon the furnishing of a release from the administratrix of the decedent's estate, or necessary proofs of insurable interest, Harmeyer resorted to every possible method to embarrass the company and to force it to pay the money to him despite the propriety of the requests which had been made of him. He wrote to the superintendent of insurance for the state of New York alleging that he had complied with every requirement of the company, but that it had entirely ignored his communications, and declined to pay his claim, and accusing officials of the company of being tricksters who were purposely withholding payment from him. He also wrote to the post office inspector accusing defendants of using the mails with intent to defraud and alleging that stories were in circulation that the

1914.]

Insurance Co. v. Harmeyer.

company was totally insolvent and that it was its practice to refuse the payment of claims. In addition thereto he inserted advertisements in the local newspapers alleging that the company had unjustly refused to pay his claim, and that he would be glad to hear from others who had similar claims against the company which had not been paid.

During all this time the company wrote letters, which were decidedly moderate in tone, reiterating its previous statements and assuring Harmeyer that his claim would be paid as soon as he had complied with its reasonable demands, but that until he did so, it could not pay his claim without subjecting itself to a liability to Schmidt's estate upon the same policy; but as a result of the unjust and improper publicity which Harmeyer was giving it, the company filed this suit interpleading Harmeyer and the administratrix of Schmidt's estate and paid the money into court and was discharged from all liability. It is Harmeyer's contention that under the law of this state the assignee of a life insurance policy is not required to have an insurable interest in the life of his assignor; therefore the company's request was unreasonable and improper, and he was justified in taking such steps as he saw fit in order to force the company to pay the money to him. This claim is by no means supported by the authorities. It is true that in a majority of jurisdictions the assignment of a life insurance policy to one having no insurable interest, where the assignment is not made by way of cover for a wager policy, is permissible. This rule obtains in this state (*Eckel v. Renner*, 41 O. S., 232, approved and followed in *Keckly et al v. Coshocton Glass Company*, 86 O. S., 213). The rule also obtains in Arkansas, Connecticut, Illinois, Indiana, Iowa, Massachusetts, Mississippi, Maryland, Michigan, Nebraska, New Hampshire, New York, Rhode Island, South Carolina, Tennessee, Wisconsin and Vermont. The Supreme Court of the United States at first denied the validity of such assignments (*Cammack v. Lewis*, 15 Wallace, 643; *Warnock v. Davis*, 104 U. S., 775). But it is since held that such assignment is valid, and now seems to be in accord with the weight of authority. *Insurance Company v. Armstrong*, 117 U. S., 591.

But this rule is subject to the limitation that there be an absence of prohibitory legislation, and that there be no contract stipulation to the contrary. If there be such stipulation, the assignment will not be binding as between the company and the assignee, in the event of a suit upon the policy (*Eckel v. Renner, supra; Page v. Burnstine*, 102 U. S., 664; *Insurance Company v. Insurance Company*, 81 Alabama. 329; *Insurance Company v. O'Brien*, 92 Michigan, 584). It is therefore manifest in our opinion, that if this were an action brought by Harmeyer against the company no recovery could be had.

Harmeyer, however, contends that as this provision of the policy was manifestly inserted for the benefit of the company, it has waived its right by paying the money into court and interpleading himself and the executrix of the decedent's estate, and that as between himself and the representative of that estate the assignment is valid, and he is therefore entitled to the fund now in the hands of the court.

This is a common law or equitable interpleader, and the case is submitted to the court as an equitable proceeding, and the court sits for the purpose of doing equity between the parties. It is trite law that one who invokes the powers of a court of equity must himself come into court under circumstances which indicate that he is, with reference to the matter in litigation, entitled to the assistance of the court; that with reference to the matter in controversy he has himself acted properly and with due regard to the rights of others. It is manifest from a perusal of the correspondence in this case that Harmeyer has from the very beginning acted in a grossly unconscionable manner, and has by his misstatements and reprehensible conduct placed the company in a position in which, in self-defense, it had no choice excepting to pay the money into court and thus compel him to look to the court for a determination of his rights. Were we to grant him the relief for which he prays, we would necessarily be sanctioning his conduct and permitting him to take advantage of his own improper acts. We are therefore of the opinion that Harmeyer has by his conduct disentitled himself to the assistance of a court of equity, and that his cross-petition in interpleader must therefore be dismissed, and he must be relegated to such right of action as he may have at law.

1914.]

Education Society v. Huntington.

**EASEMENT IN HALLWAYS AND TOILET FACILITIES
UPHELD.**

Superior Court of Cincinnati.

**THE WESTERN EDUCATION SOCIETY V. FRANK HUNTINGTON AND
MARY KINSELLA HUNTINGTON.**

Decided, February 11, 1914.

Easements—Nature of and Mode of Creation—Extent to Which They Will be Protected—Easement Created by Mortgage—Common Law Doctrine as to Mortgages Prevails in Ohio—Mortgage Conveys Not Only the Naked Title But Necessary Incidents Thereto—Application of the Rule Where Mortgaged Premises and the Servient Tenement Were Continuously the Property of the Mortgagor—Incorporeal Hereditaments Appurtenant.

1. Although a mortgage upon real estate is primarily a security for the payment of a debt or the performance of some other obligation, yet it is, in addition thereto, a conveyance of the estate upon condition, giving to the mortgagee the benefit of the doctrines applicable to *bona fide* purchasers for value.
2. Where an owner of a piece of property erects thereon two houses the first of which is accessible only through the second, the severance of the joint ownership by mortgage of the first will be as effective to pass the easement to the mortgagee as an absolute conveyance by deed.
3. Prior to 1885 H constructed two houses on a lot owned by him. The only means of ingress and egress to one house was through the hallways of the other, and the toilet facilities to be used by the tenants of both were located entirely on the latter premises. In 1885 he mortgaged the former to plaintiff, the premises remaining in the same condition up to the present time. In 1910 H deeded the latter house to K and shortly thereafter plaintiff foreclosed its mortgage on the other and purchased it at foreclosure sale. K then proceeded to close up the passageways and toilets in her house which had been used by the tenants of plaintiff's house.

Held: That an easement in these privileges, which were continuous, apparent and reasonably necessary to the use and enjoyment of plaintiff's house, passed to plaintiff by virtue of the mortgage of 1885, and could not be disturbed by defendants.

*Thornton M. Hinkle and Frederick W. Hinkle, for plaintiff.
Simeon M. Johnson, contra.*

OPPENHEIMER, J.

Some time prior to June 9th, 1885, defendant Frank Huntington, being then the owner of lots 99 and 100 on the plat of subdivision of lands in Cincinnati, Ohio, made by William C. Huntington, constructed two adjoining houses upon them known as 129 and 131 Saunders street, Mount Auburn. These houses fronted $22\frac{1}{2}$ feet each on the south side of Saunders street and extended southwardly 90 feet to Edinboro Place, which street is about 50 feet below the level of Saunders street. The upper three stories front on Saunders street, from which there is a separate entrance to each house. The lower three stories front on Edinboro Place, the one entrance to them being through No. 131. The entrance to the lower floor is by means of a hallway which opens directly into Edinboro Place, and which is situated along the west side of No. 131. The access to the next floor is by a stairway on the outside and to the east of No. 131, which stairway leads to a porch from which a doorway opens into a hall which runs from the east side of No. 131 to a hall on the west side thereof which corresponds with the hallway on the first floor. The access to the third floor is by way of the same outside stairway and porch through a door to a flight of steps leading to a hall in the third floor which is situated on the west side of No. 131 and corresponds with the hallway on the first floor. From the several hallways along the west side of No. 131, doors open through a partition wall between the two buildings into the rooms which constitute the several apartments of No. 129.

The water supply for both houses is through the pipes and meter located in No. 129. The toilets and water closets which are used by the tenants of both houses are situated on the east side of No. 131, and are accessible only through the halls of that building. Both houses are rented in apartments or flats of several rooms to various tenants. The buildings, so far as the several passageways referred to are concerned, are in the same condition now as when they were originally constructed, there being no entrance to the lower floors of No. 129 except through No. 131 as heretofore described.

1914.]

Education Society v. Huntington.

On June 9th, 1885, Frank Huntington, who was then unmarried, executed a mortgage covering the entire property known as No. 129 Saunders street to plaintiff, the consideration therefor being a loan of \$4,000, payable five years after date. This mortgage is in the usual form, covering "all the estate, title and interest of said Frank Huntington either in law or in equity, of, in and to the said premises; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; to have and to hold the same to the only proper use of the said Western Education Society, its heirs and assigns forever." There then follow the usual covenant against incumbrances, and the defeasance clause.

On May 26, 1886, Frank Huntington executed another mortgage in favor of plaintiff covering the same property, the consideration therefor being a loan of \$2,500, payable three years after date. This mortgage contains the same provisions as the preceding mortgage excepting that in the warranty against incumbrances said preceding mortgage is excepted.

On August 20th, 1910, Frank Huntington, who was still unmarried, executed and delivered to Mary Kinsella a deed of general warranty covering lot 100, together with the house thereon, known as No. 131 Saunders street, the consideration therefor being one dollar and a marriage contract which had been previously entered into between the grantor and the grantee. This deed covered a number of pieces of property which has belonged to the grantor, and contained the usual clauses except a covenant against incumbrances.

On September 21, 1910, Frank Huntington was duly adjudicated bankrupt in the United States District Court for the Southern District of Ohio, Western Division, and Henry Straus was appointed trustee of his estate. Shortly thereafter the Western Education Society filed in the bankruptcy case a cross-petition for the foreclosure of its mortgage on No. 129 Saunders street, and at the conclusion of the proper proceedings the property was sold at foreclosure sale and bought in by the Western Education Society to protect its own claim, which then aggregated more than \$6,800. A trustee's deed was accordingly ex-

executed by Henry Straus, trustee in bankruptcy, and delivered to the Western Education Society.

On June 16, 1911, Frank Huntington and Mary Kinsella Huntington, who had then intermarried, executed and delivered to plaintiff a quit-claim deed covering the same property, and containing this clause:

“To have and to hold the same, with all the privileges and appurtenances thereunto belonging, to said grantee, its successors and assigns forever.”

The purpose of this quit-claim deed was to complete plaintiff's chain of title, and the consideration therefor was recited to be “one dollar and other valuable considerations, including the release of the grantor (*sic*) from all personal liability on the respective notes secured by the mortgages set forth below,” and the two mortgages heretofore referred to are then recited.

All these conveyances were recorded in accordance with law.

Since the date of the transfer of the house at No. 131 Saunders street to Mary Kinsella, Frank Huntington has been acting as her agent in the management of the property and the collection of the rents. At all times prior to the execution of the deed from the trustee in bankruptcy to plaintiff, Frank Huntington had also collected the rents for No. 129 Saunders street and had paid all charges upon the property, including the interest upon the mortgages executed to plaintiff.

The petition alleges, and it is admitted to be true, that defendant Mary Kinsella Huntington now threatens to cut off the passageways to the lower floors of No. 129 which front on Edinboro Place as hereinbefore described, and to deprive its tenants of the use of the toilet facilities and water closets in No. 131. A temporary restraining order was issued, and plaintiff now seeks to have it made permanent, while defendants ask to have it dissolved.

It is urged on plaintiff's behalf that as the property was in its present condition with respect to passageways and privileges at the time when the mortgage of June 9th, 1885, was executed, and as such privileges were at all times open and visible, plaintiff

1914.]

Education Society v. Huntington.

is entitled to their benefit without let or hindrance from defendants. On the other hand, it is urged by defendants that as plaintiff was merely a mortgagee, and as the mortgagor at all times remained in possession and control of both pieces of property, no easement was ever created in favor of plaintiff, but at most only a privilege which was revocable at will; that the first severance of the joint ownership of the properties took place when the deed of August 20th, 1911, was executed and delivered to Mary Kinsella, until which time no adverse possession could be said to have existed, and that defendant Mary Kinsella Huntington may therefore close up all passageways leading from her property to that which has been acquired by plaintiff by virtue of the foreclosure proceedings.

These respective contentions raise directly the question whether an easement was in fact created in favor of plaintiff when the mortgage of June 9th, 1885, was executed and whether, if such easement was actually created, it exists in favor of plaintiff as against defendant Mary Kinsella Huntington. This necessitates an investigation as to the nature and mode of creation of easements, and the extent to which they will be protected when created.

The law of real property recognizes three kinds of so-called incorporeal hereditaments: first, such as are *appendant* to corporeal hereditaments; second, such as are *appurtenant* to them, and third, such as exist *in gross*. We are concerned only with the second class. An incorporeal hereditament appurtenant may be defined for our purposes as a right, privilege or easement annexed to the ownership of real property. At common law it was said to lie in a grant (as distinguished from corporeal hereditaments, which were said to lie in livery), because livery of an intangible right being impossible, it would pass by simple deed or grant. The right thus attached to real property, which is most commonly known, is the right-of-way or passage over the property of another. This right may be created either by an express deed of grant, or by prescription which presupposes the existence of a grant; and when thus created or annexed to land, it will pass by a conveyance of the land to which it pertains, without specific

mention. *Coke on Litt.*, 121 B; *Kent v. Waite*, 10 Rich., 138; *George v. Cox*, 114 Mass., 382; *Newman v. Nellis*, 197 N. Y., 285.

Indeed, in England, by statute known as the Conveyancing Act of 1881 (44 and 45 Vict., c. 41, S. 6, Sub-s. 1), a conveyance is now admitted to include all ways and "other liberties, privileges, easements, rights and advantages whatsoever reputed to pertain to, or at the time of the conveyance enjoyed with, the land and any part thereof." In consequence of this enactment, even such general words as "with the appurtenances" are now admitted surplusage in a deed, and are rarely employed.

Our Supreme Court has, in the case of *Railway v. Wachter*, 70 O. S., 113, at 117, defined an easement as a right-of-way or "a servitude imposed as a burden upon the land." It would probably be more accurate and less confusing to apply the easement exclusively to the liberty or privilege which the owner of the parcel known as the dominant tenement has in the lands of another, the latter being known as the servient tenement, and to reserve the term "servitude" to apply to the right or privilege in the servient tenement which exists for the advantage or convenience of the owner of the dominant tenement. In a later case, our Supreme Court has defined an easement as a "right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former." *Yeager v. Tuning*, 79 O. S., 121, 124.

It is apparent that in order to constitute an easement there must be two estates, one giving and the other receiving an advantage or benefit. So long as the estates belong to one owner, no easement can exist, for manifestly a person can not be said to have a privilege or benefit in favor of one piece of property owned by him in another piece of property which he likewise owns; and if the dominant and servient tenements at any time are united in a common ownership, any easement which may have previously existed is *ipso facto* extinguished. *Washburn on Easements*, 684.

In the case at bar it is not disputed that if the conveyance of June 9th, 1885, to plaintiff had been by deed, the easement for which plaintiff contends would have been created in its favor,

1914.]

Education Society v. Huntington.

and that the property owned by defendants would have been burdened with a servitude in favor of plaintiff's property. But defendants claim that a mortgage in Ohio is merely a security for a debt, and therefore has not the effect of creating an easement which would have been created by a deed. This necessitates a consideration of the legal effect of a mortgage in this state.

At common law a mortgage was regarded as a conveyance of the absolute legal title to the estate designated therein. A mortgagee became the owner of the premises, though his title might be subsequently defeated by the performance of certain conditions. These conditions were usually designated as *conditions subsequent* although, in our opinion, they are in reality *conditions precedent* to the revesting of title in the mortgagor. The mortgagee was actually entitled to immediate possession of the premises, and might treat the mortgagor as a trespasser and maintain ejectment proceedings against him even before default, unless he had agreed that the latter might remain in possession. Even if the mortgagor performed his part of the contract and paid the debt, the legal title was not thus restored to him, but a reconveyance by the mortgagee was necessary to accomplish this end. If there was a breach of the conditions of the mortgage, the title of the mortgagee became absolute and indefeasible and the mortgagor's interest in the property thereupon terminated.

In equity, however, the rigid rule of the common law was much mollified. A mortgagor was given the privilege of redeeming the property after breach of the condition, this privilege being based, in all probability, upon the equitable theory of accident, and the maxim that equity looks rather to the intent than the form and will relieve against legal penalties and forfeitures when adequate compensation can be made by the award of money (*Pomeroy's Equity Jurisprudence*, Section 1180). The right thus given a mortgagor was called the equity of redemption. This designation came then to be applied to the interest which the mortgagor had retained after he had conveyed the legal title to the mortgagee. This equitable right was a distinct and separable interest, which might be granted, mortgaged, devised, entailed or taken in execution, and in which an estate in dower or

by the curtesy might be claimed; and the mortgage itself came to be regarded as a mere lien or security for a debt to which it was only an accessory.

It is significant, however, that there was no encroachment by either jurisdiction upon the other. The equitable and legal systems grew up side by side and were regarded as mutually consistent. Courts of equity did not attempt to control the law courts or to question the doctrines which they enunciated; but on the contrary they recognized the force and validity of the legal rule by requiring a formal re-conveyance by the mortgagee of an estate redeemed after forfeiture (*Coote on Mortgages*, 14; *Barrett v. Hinckley*, 124 Ill., 32). A mortgagee might avail himself of both legal and equitable remedies. He might sue at law for the debt or in ejectment or resort to the equitable remedy of foreclosure. Or he might first acquire possession by a legal recovery in ejectment and then institute suit in equity to terminate the mortgagor's right to redeem by a decree for foreclosure.

In this country there has been no absolute uniformity in the views which have been taken of the respective rights of the mortgagor and the mortgagee. In many of the states the common law doctrine of mortgages has been entirely abrogated, and has given place to a purely equitable theory according to which a mortgage is a mere lien or security for a debt, creating no title or estate in favor of the mortgagee and giving him no right or claim to the possession of the property. This doctrine prevails in California (*Booker v. Castillo*, 154 Cal., 672); in Colorado (*Railway Company v. Beshoar*, 8 Colo., 32); in Delaware (*Malsberger v. Parsons*, 75 Atl., 698); in Georgia (*Phillips v. Bond*, 132 Ga., 413); in Indiana (*Baldwin v. Maroney*, 173 Ind., 574); in Iowa (*Whitley v. Barnett*, 151 Ia., 487); in Kansas (*Beckman v. Sikes*, 35 Kansas, 120); in Michigan (*Dawson v. Peter*, 119 Mich., 274); in Minnesota (*Geib v. Reynolds*, 35 Minn., 331); in Montana (*Mueller v. Renkes*, 31 Mont., 100); in Nebraska (*Clark v. Trust Company*, 59 Neb., 53); in Nevada (*Orr v. Ulyatt*, 23 Nev., 134); in New Mexico (*Alexander v. Cleland*, 13 N. M., 524); in New York (*Barson v. Mulligan*, 191 N. Y., 306); in North Dakota (*McClory v. Ricks*, 11 N. D.,

1914.]

Education Society v. Huntington.

38); in Oklahoma (*Yingling v. Redwine*, 12 Okla., 64); in Oregon (*Bailey v. Fraser*, 124 Pac., 643); in South Carolina (*Wallace v. Langston*, 52 S. C., 133); in South Dakota (*Farr v. Semmler*, 24 S. D., 290); in Texas (*Ferguson v. Dickinson*, 138 S. W., 221); in Utah (*Azzalia v. St. Claire*, 23 Utah, 401); in Virginia (*Bank v. Beard*, 100 Va., 687); in Washington (*Norfar v. Busby*, 19 Wash., 450); and in Wisconsin (134 Wis., 191).

However, there is another large class of cases in which the common law doctrine of mortgages prevails, although it is more or less extensively modified by equitable principles. Among these states are the following: Alabama (*Cotton v. Carlisle*, 85 Ala., 175); Arkansas (*Whittington v. Flint*, 43 Ark., 504); Connecticut (*Cook v. Bartholomew*, 60 Conn., 24); Illinois (*Ladd v. Ladd*, 252 Ill., 43); Maine (*Allen Co. v. Emmerton*, 108 Me., 221); Maryland (*Chilton v. Green*, 65 Md., 272); Massachusetts (*Kinney v. Treasurer*, 207 Mass., 363); Mississippi (*Buck v. Payne*, 52 Miss., 271); Missouri (*Leather Co. v. Insurance Co.*, 131 Mo. App., 701); New Hampshire (*Morse v. Whitcher*, 64 N. H., 591); New Jersey (*Devlin v. Collier*, 53 N. J. L., 422); North Carolina (*Cauley v. Sutton*, 150 N. C., 327); Pennsylvania (*McIntyre v. Velte*, 153 Pa. St., 350); Rhode Island (*Reynolds v. Hennessy*, 15 R. I., 215); Tennessee (*Bank v. Ewing*, 12 Lea., 598); Vermont (*Brunswick v. Herrick*, 63 Vt., 286). In Virginia and West Virginia this doctrine has always prevailed, but mortgages are being practically superseded by trust deeds.

Ohio follows the rule last mentioned. It is true that a mortgage is primarily a security for the payment of a debt or the performance of some other obligation, yet it is in many of its aspects and essentials a conveyance of an estate. In other words, it is something more than a mere lien. It passes the property conditionally to the mortgagee, giving to him the benefit of all the doctrines applicable to *bona fide* purchasers for value (*Harkrader v. Leiby*, 4 O. S., 602). It is, for example, construed as a conveyance within the statute of frauds and perjuries (*Webb v. Roff*, 9 O. S., 430). It is construed in the same manner as a deed with reference to the extent of the estate which is created, and in the interpretation of its covenants and clauses (*Brown*

v. *Bank*, 44 O. S., 269). It creates an interest in the property itself, as distinguished from a mere lien upon the property, which interest is insurable. *McDonald v. Black*, 20 Ohio, 185.

As early as the case of *Raguet v. Roll*, 7 Ohio (pt. 2), 70, the question of the interpretation of a mortgage was presented to the Supreme Court of this state. The court said (p. 72):

"If the deed in this instance were an absolute conveyance, there could be no doubt then of the right of the plaintiff to recover. The real difficulty arises out of the double character of the instrument, which is evidence of a debt hereafter to be paid, and at the same time operates an actual transfer of the land to the mortgagee. Although a strong disposition existed once to treat a mortgage as a mere chose in action, and although individual judges were heard to declare that the money was the principal, and the land only the incident, and that whatever would carry the money would convey the land, yet such is not now supposed to be the law. A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable. * * * A mortgage is in reality an actual payment of the debt, as well as an actual transfer of the land, although, in consequence of the land being sometimes greater in value than the debt, *an equity* was supposed to arise in favor of the mortgagor which was called his right of redemption, and which is now extended to every case of a conveyance by way of mortgage."

In *Miner v. Wallace*, 10 Ohio, 404, it is said by the court (p. 405):

"The mortgagee, as between the parties to the mortgage, and in regard to all purposes contributing to the collection of his debts, is a purchaser and entitled to all his privileges of protection."

In *Choteau v. Thompson*, 2 O. S., 114, the Supreme Court said (p. 122):

"A mortgage is a grant of an estate upon a condition. This distinguishes it from those simple pledges which pass no title but only create a lien. * * * A conveyance of an estate seems indispensable to create a mortgage."

In *Holmes v. Gardner*, 50 O. S., 167, the court says (p. 176):

1914.]

Education Society v. Huntington.

“While the mortgage itself is certainly a lien for a debt, it is something more. In *United States v. Fisher*, 2 Cranch., 358, the court declared, ‘that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee.’ And in *Conrad v. Insurance Co.*, 1 Pet., 441, a mortgage is declared to be a ‘transfer of the property itself as a security for the debt.’”

In the case of *Campbell v. Sidwell*, 61 O. S., 179, the court says (p. 187):

“The claim of the judgment creditor is fixed by statute and is purely legal. That of the mortgagee is also statutory, but it rests, also, on equitable considerations, inasmuch as he has parted with his money upon the faith of a condition, as to title and possession, existing by reason of the voluntary act of the vendor. He has not only a lien upon the property, but has a conveyance of the estate by way of pledge, and is in the position of a *bona fide* purchaser with a right to use the legal title for the purpose of making his security effectual.”

The last citation indicates a matter of considerable importance in determining the question presented for our consideration. The conveyance is manifestly made for the purpose of securing against loss one who has advanced money upon the faith of the conveyance. The mortgagor is supposed to have selected the terms employed in the conveyance, so that it is construed most strongly against him, and in such manner as to make it adequate for the purpose for which it is intended (*Jones on Mortgages*, Section 101; *Railway Co. v. Trust Co.*, 2 N.P.[N.S.], 529; *Tuttle v. Burgett*, 53 O. S., 498). It is therefore presumed that one who executes a mortgage transfers not merely the naked title to the *res* itself, but also all the incidents thereto which are reasonably necessary to make the ownership effective and to make the security adequate.

Thus, it has been held that a mortgage of a lot also covers the easement which it has in an adjoining lot created by a party wall agreement. *Maupai v. Jackson*, 118 N. Y. Supp., 513. It has also been held that a mortgage of a lot “together with all appurtenances” covers an easement in an irregular strip of land used as a means of ingress and egress in connection with another

lot, both lots and the strip having previously been owned in common. *Putnam v. Putnam*, 78 N. Y. Supp., 987.

In the case of *Bank v. Insurance Co.*, 83 Minn., 377, it was held that the foreclosure of a real estate mortgage thus transfers to the purchaser at the sale all such rights, privileges, and easements as are appurtenant and necessary to the enjoyment of the mortgaged property, including an easement in the adjoining land on which the building extended and rested, to the extent necessary to support the same. The court says (p. 382):

"Every right or interest held by the mortgagor in or to the mortgaged property, together with all subsequently acquired rights, easements and privileges which are necessary and essential to the enjoyment of the property, passes with the mortgage. * * * Under this rule it is held that an easement passes with the land to which it is appurtenant without express reference to it in a deed of conveyance."

And the court further says:

"There can be no difference between the rights acquired in a deed and those granted and secured under the mortgage. While the mortgage is but a conditional sale and transfer of the incumbered estate, the sale becomes absolute and all rights of the mortgagor pass to the mortgagee on foreclosure."

The case of *Exchange Bank v. Cunningham*, 46 O. S., 575, is one of the leading cases in this country. The arrangement of the pieces of property involved was similar to that in the case at bar. The dominant tenement was accessible only by means of a stairway running through the servient tenement, both having been constructed by one owner who subsequently sold the dominant tenement to one of the parties to the case. It was held that by the conveyance the right to the use of the stairway passed to the purchaser as an easement appurtenant to the premises conveyed. The court says (p. 587):

"It is a well-settled doctrine of the law of easements that where there are no restrictive words in the grant, the conveyance of the land, will pass to the grantee, all those apparent and continuous easements which have been used, and are at the time of the grant used by the owner of the entirety for the benefit of the

1914.]

Education Society v. Huntington.

parcel granted; and also, all that appear to belong to it, as between it, and the property which the vender retains; and hence when the owner of an entire estate makes one part of it visibly dependent for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the land."

The case of *Baker v. Rice*, 56 O. S., 463, is also often cited. The syllabus in this case reads as follows:

"Where one who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and, also, adds materially to its value, conveys by deeds of the same date, the part with the way to it to one of his children and the part with the way over it to another one of them, each takes his part to be enjoyed with reference to the way as the same existed at his time of the division—the one with an implied grant of the way to it, and the other subject to such way as an easement therein."

But it is contended on behalf of defendant that although a mortgage will cover an actually existing easement, where such easement has already been attached to property, it will not create an easement where the mortgaged premises and the servient tenement have both been at all times the property of the mortgagor. We can not, however, agree with defendants in this contention. It makes no difference, in our opinion, in what manner the severance is effected. Thus, upon partition of real estate between heirs, each heir takes his share of land subject to any apparent, permanent, continuous and reasonably necessary *quasi* easement which existed thereon for the benefit of another part of such real estate, at the death of the ancestor. *Johnson v. Gould*, 60 W. Va., 84. In this case the court quotes with approval from *Elliott v. Rhett*, 5 Richards (S. C.), 405, as follows:

"The grant of continuous and apparent easements is implied on severance of heritage, where, though having no legal existence

as easements, they have in fact been used by the owner during the unity of the heritage or where they are necessary to the full enjoyment of the several portions of the heritage."

And in the case of *Havens v. Klein*, 51 How., Pr., 82, the court carefully considers and directly determines the very question presented in the case at bar. In that case a common owner of two tenements, the windows of one of which overlooked the yard of the other and received light and air therefrom, its shutters swinging out over such yard, and its fire escapes overhanging the yard through which access to them was obtainable, mortgaged both tenements. The mortgages contained the usual grant with all "rights, privileges, and appurtenances thereunto belonging." Both mortgages were foreclosed. The court held that the easement being apparent, the grantee of the servient tenement, which was the one later mortgaged, is deemed to have actual notice of the easement and takes his title subject thereto and it is immaterial in such case whether the severance be by deed or mortgage. The court quotes with approval from the opinion of Seldon, J., in *Lampman v. Mills*, 21 N. Y., 511:

"If both proprietors obtain their title from a common source * * * the windows can not be obstructed; and the reason is that the relative qualities of the two tenements must be considered as fixed at the time of their severance. Each retains as between it and the other the properties thus visibly attached to it and neither party has the right afterwards to change them."

The case of *Burnett v. Helker*, 15 O. D. Rep., 600, decided by this court in general term, is similar in some respects to the case at bar. The owner of a tract of land constructed adjoining houses with toilet facilities connected with one of the houses which were used by the tenants of both houses indiscriminately. He then conveyed the house without toilet facilities to defendant, and then sought to prevent the tenants of the house so conveyed from using these common toilets. The court said (p. 601):

"The conclusion seems plain that the right to use the closet in question passed with the conveyance of the property, for the convenience of the occupants of which it was constructed, in

1914.]

Education Society v. Huntington.

connection with which it had been and still is used, and to which it was and is a necessary appurtenance.”

In the case of *Insurance Company v. Patterson*, 103 Ind., 582, it was held that where the owner of an estate imposes upon one part of it an apparently permanent and obvious servitude in favor of another, and at the time of severance of ownership such servitude is in use and is reasonably necessary for the fair enjoyment of the other, then whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. In that case the owner of the house and lot placed a mortgage thereon, and after the foreclosure of the mortgage it appeared that the house projected a few feet over the adjoining lot belong to the same owner. The court, in deciding that the right to the support on such lot passed with the grant said (p. 586):

“In such case, the law implies that with the grant of the one (part of an estate) an easement is also granted or reserved, as the case may be, in the other (part), subjecting it to the burden of all such visible incidents and uses as are reasonably necessary to the enjoyment of the dominant heritage in substantially the same condition in which it appeared and was used when the grant was made.”

And again (pages 587, 588):

“The application of the rule must depend upon the nature, arrangement and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use, the reasonable intendment of the parties; the underlying principle in such cases being that, included in the grant of the principal, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided. * * *

“Where such arrangement is visible and apparently designed to be permanent, and is valuable and reasonably necessary to the enjoyment of the parcel granted, the parties will be presumed to have contracted with reference to the condition of the property

at the time of the grant and 'neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.' "

Defendants suggest that the easement in this case is not one of strict necessity, but that it is possible for plaintiff to construct, at a comparatively small cost, an independent means of ingress and egress, and separate toilets and water closets for the premises now owned by it. This, of course, directly raises the question of the degree of necessity essential to the acquisition of a way. This has been incidentally touched upon in some of the cases heretofore referred to, but we shall proceed to discuss the question at greater length.

It may first be pointed out that there is a difference where the way is created by grant or merely reserved by the grantor in the property retained by him. In the latter case, it will not be presumed that the grantor intends to derogate from his grant, so that to warrant the inference of reservation the way must be one of strict necessity (*Meredith v. Frank*, 56 O. S., 479; *Keyler v. Eustis*, 13 N.P.[N.S.], 601). In the former case, however, the rule is somewhat different. The degree of necessity which must exist in the case of a grant to give rise to an easement by implication is such merely as renders the easement reasonably necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. Thus in the case of *Mosher v. Hibbs*, 1 C.C.(N.S.), 49 (24 O. C. D., 375, 380), the court indicates that it is its opinion that an easement will be granted by implication where it is apparent, continually used and reasonably necessary to the use and enjoyment of the lands to which the way is constructed and also adds materially to its value. In the case of *Meredith v. Frank*, *supra*, the court says (p. 488):

"The reservation of a way by the grantor in apparent derogation of his deed and its covenants, stands upon a much narrower ground than does the case of a grant. In the latter case * * * a way passes by implication where it has been attached to the part granted by the grantor and is apparent and necessary to the reasonable enjoyment of the premises granted. It is not necessarily a way of strict necessity."

1914.]

Education Society v. Huntington.

In the case of *Insurance Company v. Patterson*, *supra*, the court said (p. 589):

"The degree of necessity is to be determined rather by the permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other. * * *

"The reasonable application of the doctrine, as we deduce it from the authorities, however, leads to the general conclusion that if the service imposed on one, during the unity of possession of two parcels of land, was of a character looking to permanency, and the discontinuance of such service would obviously involve an actual and substantial rearrangement of that part of the estate in whose favor the service was imposed, to the end that it might be as comfortably enjoyed as before, then such a degree of reasonable necessity would seem to exist as would raise an implication that the use was to be continued."

In this connection see also the case of *Kelly v. Deming*, 43 N. J. Equity, 62; *Miller v. Lapham*, 44 Vt., 416. Counsel for defendants refers to the case of *Fertilizing Company v. Railway Company*, 7 N. P., 245, 253. The opinion in that case, however, must be taken in connection with the facts of the case. Plaintiff had access to his land over another parcel of land belonging to himself. Although this mode of access was less convenient than the original way over defendant's land, the court held that the rights of the parties could not be determined by a mere balance of conveniences and judgment was entered for the defendant. Defendants suggest that plaintiff might make the property accessible directly from Edinboro Place by breaking through the front wall, continuing the hallway along the east side of No. 129 to the street, and constructing a stairway in the rear of the premises, where a coal cellar now exists, as well as a stairway and porch to the west of the building in an area way 4 ft. 11 in. in width; that toilet facilities may be constructed upon the east side of the same building; and that a separate water meter and connections may be put in. The exact cost of this change is not apparent, nor is it, in our view of the case, material, as it would undoubtedly involve considerable change, the necessity for which

could not at any time have been apparent to plaintiff. We might also suggest that from a sociological and sanitary point of view we can not bring ourselves to require the construction of hallways, stairways and toilets which would be without light or ventilation except such as might be furnished by vents leading through the roof of a six story building.

Defendants sole remaining contention is that plaintiff has failed to repair the passageways leading through the premises at No. 131, or pay to defendants the money expended for that purpose, and that it has failed to pay the entire cost of certain repairs to the plumbing which are said to have been rendered necessary by acts of plaintiff's tenants. We do not think this position well taken. The testimony does not indicate that the repairs to the passageways had been rendered absolutely necessary.

In the case of *Exchange Bank v. Cunningham, supra*, the court says (588-9):

"It is undoubtedly the rule that unless the owner of the servient estate is bound by covenant or prescription to repair, he is under no obligation to do so. The burden devolves upon the owner of the dominant estate of making whatever repairs are necessary for *his use of the easement*. It is said by a learned author that 'As a general proposition, whoever has an easement, like a right of way for instance, in or over another's premises, is the one to keep it in repair.' Washburn on Easements, 730. And by another, that 'Every grantee of a right of way, to be exercised and enjoyed over or through the land of the grantor must himself repair the way if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement unless the grantor himself has expressly undertaken the performance of that duty.' *Addison on Torts*, 301-302."

As it does not appear that any demand for a contribution has ever been made of plaintiff, we do not think it just to permit defendants to make such repairs as they think necessary and then urge the payment therefor as a reason for forfeiting a ripened easement in their premises.

1914.]

State v. Finley et al.

Accordingly a decree may be entered making permanent the temporary restraining order heretofore granted, forbidding defendants from interfering in any way with the use of the easements, privileges and appurtenances heretofore set out. It will be understood that this merely establishes the right of the tenants in plaintiff's property to make use of these easements, but does not give them the right permanently to occupy the porches and halls for the drying of clothes and other similar purposes.

**SOLICITATION OF POLITICAL CONTRIBUTIONS FROM
CIVIL SERVICE EMPLOYEES.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. WILLIAM FINLEY AND A. V. ABERNATHY.

Decided, April 13, 1914.

Criminal Law—Sufficiency of Indictment Charging Solicitation of Political Contributions—Scienter—Wilful Doing and Doing with Knowledge—Construction of the Words "During" and "Concerned."

1. Inasmuch as the wilful doing of a thing involves doing it with knowledge, it is not necessary that an indictment charging the wilful solicitation of contributions from employees in the classified service of the state should allege the solicitation was done with knowledge that the persons so solicited were in the classified service.
2. An allegation that certain persons were in the employ of the state "during the month of January" will be construed to mean that they were so employed throughout the month of January.
3. The allegation that the defendants were "concerned" in the solicitation of certain contributions from civil service employees for political purposes, can not be so limited in meaning as to constitute a mere statement that they were interested in or anxious about said contributions, but is a charge that they had a part in and were joint actors in such solicitation.

Timothy S. Hogan, Attorney-General, and Edward C. Turner, for plaintiff.

Booth, Keating, Peters & Pomerene, contra.

DILLON, J.

A motion is made to quash the indictment in this case. Similar motions have been made to a number of other indictments which are in the same form, and the decision in this case will be the decision in all.

The defendants in these cases have been indicted under that part of the act of April 28th, 1913 (103 O. L., 698-713), and especially Section 23 thereof, which forbids any person from soliciting directly or indirectly, or being in any manner concerned in soliciting an assessment, contribution or payment from any officer or employee in the classified service of the state, in behalf of any political party or for any candidate for public office. This motion to quash partakes also of the nature of a demurrer, either being proper, and is based upon a number of grounds:

1. It is claimed that the indictment does not state that the defendants knew that the parties solicited were in the classified service.

2. That the indictment does not state that the parties solicited and paying the money were in the classified service at the time of the solicitation.

3. That charging the defendants with being concerned with the solicitation simply charges them with a frame of mind or a condition of mind and does not charge them with any act of omission or commission.

4. That the indictment as a whole is too indefinite and vague and does not sufficiently inform the defendants of the nature of the charge against them.

Section 10 of the Bill of Rights provides among other things that a person indicted, as in this case, shall have the right to demand the nature and cause of the accusation against him, and this clause has received an interpretation which, in general terms is the same throughout the cases, beginning with the case of *Lamberton v. State*, 11 Ohio, 282, and followed in general terms from that time to this. The doctrine announced by the decisions in this state and which seems to be unchallenged, is that a criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged of that which he

1914.]

State v. Finley et al.

may expect to meet and be required to answer, so that the court and jury may know what they are to try and the court may determine without unreasonable difficulty what evidence is admissible; also that the record to be made will be sufficiently definite to make it clear of what the party has once been put in jeopardy. *DuBrul v. State*, 80 O. S., 52.

With the foregoing general proposition of law before us, the conflict of cases, or the apparent conflict of cases, simply lies in the application of this wholesome rule to each individual case. It, therefore, is a matter purely of fairness to the defendant and is based upon most wholesome policy and sound reason; and it becomes the duty of the court to determine whether or not the indictments in these cases meet the requirement of the foregoing general rule.

It is first claimed that the indictment does not charge knowledge on the part of the defendant, *i. e.*, that they knew that these parties solicited were in the classified service. The statute, in words, does not make knowledge one of the essential elements of the crime. But assuming that this belongs to the class of cases where scienter is essential, it will be observed that the indictment charges that the defendants were willfully concerned in soliciting these contributions in money for a political party and from six certain employees in the classified service of the state, naming them, and in certain amounts.

Section 28 of the act reads that "Whoever wilfully violates any provisions of this act shall be deemed guilty," etc. This section undoubtedly covers the point now under discussion, and counsel have not devoted much argument to this point, it being doubtlessly conceded that the wilful doing of a thing involves the doing of it with knowledge.

The next point involved is that the indictments do not state that the parties solicited were in the classified service at the time of the solicitation. The indictment, in respect to this, charges that "During the month of January," 1914, certain persons, naming them, were each employes of the state of Ohio in the office of the state tax commission, and were in the classified service of the civil service of the state; and that on or about the

15th day of that month, the said defendants then and there were unlawfully and wilfully concerned in soliciting certain contributions in money from them, etc. The decision turns upon the construction of the word "during." Applying the common sense rule which must be adopted in all such cases, of construing words in their ordinary and usual sense as construed from the general context, it seems clear to the court that this allegation means that they were such employees, throughout the month of January. The word "during" of course, is susceptible of a number of interpretations. If we say that "during his stay in Europe, John Smith wrote a book," we do not necessarily mean that he began on the first day and ended on the last day of his stay. But if the sentence of a court be that a man be confined in the penitentiary during the remainder of his natural life, it means throughout his natural life. In other words, I construe the language of the indictment in this respect not to mean that at some time in the month of January the parties were employees, but that throughout the month of January they were such employees.

The main contention in the case, however, is that part of the indictment which alleges that the defendants "were then and there unlawfully and wilfully concerned in soliciting certain contributions in money for a political party, to-wit, the said Democratic Party, from the said M., W., C., C. and K. employees of the said state of Ohio in said classified service of the civil service of the state as aforesaid in the sums following, to-wit: From the said M., the sum of \$14, from the said W., the sum of \$18, from the said Mc. the sum of \$9, from the said C. the sum of \$9, from the said C. the sum of \$10, and from the said K. the sum of \$7.50. The full names of the parties alleged to have been solicited are set forth. The contention of counsel for the defendants is that the state should set forth in what way and in what manner the said defendants were wilfully concerned in the solicitation, and secondly that the word "concerned" does not charge any act of commission or omission, but that it simply charges that the defendants were anxious or were interested, etc., in what was going on. As to this last contention, I think little

1914.]

State v. Finley et al.

need be said. It is quite true that in the passive voice, "to be concerned" does have, among other meanings, the meaning of the one claimed, to-wit, that of being anxious, interested, as a mother may be concerned about her child. Indeed, one may be interested and anxious and in that sense concerned in a political assessment and yet, by no act on his part, be a party to it. In the active voice the word "concern" rarely receives the meaning which it has here in the passive voice. And there can be no doubt, whatever, that applying the rule of interpreting language in its ordinary common sense form as shown by the context, that in this case it means to have "taken a part in"; "had a hand in." In other words, it directly charges the defendants as being of those who were doing the act. It is a broad term and was evidently used by the Legislature advisedly. It was undoubtedly the theory of the Legislature that unless they used a term which would be broad and comprehensive, there could be surreptitious solicitations, assessments, etc., of civil service employees which would not come within the purview of the statute, and to strike down the true construction of this word would, in effect, strike down the entire statute. In construing this word, therefore, as well as in construing the word "during" it is not the function of the court to apply strained and unusual interpretations.

It has a number of times been said sarcastically and somewhat cruelly that everybody is supposed to know the meaning of language except the court. However, my conclusion has been that there can be no misunderstanding as to the meaning of this word "concerned."

The last and most important matter before the court, and to which the court has given considerable time and attention, is as to whether or not the indictment should set forth in what respect the defendants were concerned in these solicitations. Bearing in mind the rule as to fairness to the defendants in charging a crime, we have in substance the indictments, after charging the existence of the Democratic party, executive committee, etc., that the said six individuals were employees of the classified service of the state and that the various sums from each were

solicited and collected and that the defendants then and there were among those who so solicited and collected. That is to say that while others may or may not have been connected with this soliciting and collecting, that the defendants had a hand in it and were either solely or jointly with others active in the collection and solicitation. This form of indictment has been sustained for centuries in other kinds of cases. Where two persons plan to burglarize a house, and one stands on guard and the other actually enters and burglarizes the house, each are indicted in exactly the same language, to-wit, the crime of burglary and larceny, and the state does not have to set forth the part that each took in the burglary or what the particular acts of each were. Likewise, in a case of murder, one who stands guard while the other enters and commits the crime is equally guilty with the one who actually commits the crime and the indictment against each is that of murder in the first degree without setting forth of the exact part that each may have taken in it.

It must be readily granted, of course, that to be interested or anxious about a solicitation and without actual participation as one of the joint actors constitutes no crime, but actual participation in the crime may be in any of the forms which make one a conspirator. It is conceded by all parties, of course, that one indicted is not entitled to the evidence nor to the witnesses which the state may possess or later discover.

Attention is called to a decision by this branch of the court in *Adams v. State*, 14 O. D., 257, where, in the decision, the word "concerned" was held to be insufficient of itself. The language of the court on page 259 of this case, I think, explains itself. If the affidavit in that case had, as in this case, charged the facts—the particulars of the gambling, the name of the party selling the ticket and to whom, and then alleged that the defendants were concerned therein, that case would have presented an entirely different state of facts.

A number of cases have been cited to the court, each of which of course, must have as I have before mentioned, applied the rule to the specific fact before it, and it is quite natural that there should be a variety of opinion both apparently favoring

1914.]

State, ex rel, v. Hirstius.

the position of the prosecuting attorney here as well as that of the defendants.

Occasionally we find language very strong by way of *obiter*. The quotation from the case of *Groenland v. Stgte*, 4 N. P., 122, is as follows: "Such definiteness of fact as is plainly within the knowledge of the prosecution and not within the knowledge of an innocent man." If this means that the indictment must charge all the facts, which the prosecutor knows, of course, it must be conceded that that is not the law. But if it means, as I readily construe it to mean, that the ultimate facts must thus be pleaded, we find no conflict with the decision here.

Entertaining these views, the motions to quash in these several cases will be overruled.

COMPENSATION TO SHERIFFS FOR KEEPING AND FEEDING PRISONERS.

Common Pleas Court of Cuyahoga County.

THE STATE OF OHIO, EX REL FRANK F. GENTSCH, v. A. J. HIRSTIUS.

Decided, March 3, 1914.

Construction of the Salary Law—With Reference to Profits Made by Sheriffs on Subsistence of Prisoners—Fees, Allowances and Necessary Expenses—Consideration Should be Given to Construction Given these Terms by Burcaus of the State Executive Department—Sections 2977, 2997, et seq., 3179 and 2845-6.

1. Under the present salary law the sheriff of a county is given by Section 2997, in addition to his salary, the allowance made to him by the county commissioners for keeping and feeding state prisoners confined in the jail of the county, the expression "actual and necessary expenses" as to which the sheriff must file an itemized account being limited to the expenses particularly referred to in that section. The situation which is thus presented calls for attention on the part of the Legislature rather than the courts.
2. The same immunity from accounting for "fees, allowances and other prerequisites" is enjoyed by the sheriff with reference to receipts

for keeping and feeding federal and city prisoners, where such prisoners are committed to his custody by federal and city authorities under contracts which prescribe a charge for such service which is not higher than that fixed for state prisoners by Section 2850, General Code.

ESTEP, J.

This opinion is based upon a special demurrer filed by the defendant, A. J. Hirstius, to the amended petition of the plaintiff.

1. In an opinion rendered on the 7th day of February, 1913, the late Judge W. A. Babcock sustained a demurrer filed by the defendant Hirstius to the original petition. In the original petition the plaintiff sought to recover from the defendant Hirstius the profit claimed to have been made by him while sheriff of Cuyahoga county, Ohio, in feeding prisoners committed to his charge in the jail of said county. Judge Babcock, in a carefully prepared opinion, which I have read several times, held that the plaintiff did not state a cause of action against the defendant. I fully concur in this opinion, and feel that little more can be said than was said by the learned judge in the opinion referred to.

Section 2997 of the code, as I view it, clearly intended to give to the sheriff, "in addition to the compensation and salary" provided for in Section 2996, such an amount as the county commissioners should allow him quarterly, for the keeping and feeding of prisoners as provided by Section 2850 of the code.

The provision at the close of Section 2997, providing for the filing quarterly by the sheriff of a full and itemized account of all his *actual and necessary expenses*, mentioned in said section, before they shall be allowed by the county commissioners, does not refer to the matter of keeping and feeding prisoners, but refers to the *actual and necessary expenses* particularly referred to in said section. Without attempting to encumber this opinion by quoting from the opinion of Judge Babcock, I will only say that, in my opinion, this matter is one which calls for action by the *Legislature*, and *not by the courts*.

I do not want to be understood, in what I have said or may say in regard to the law of this case, as I understand it, that I ap-

1914.]

State, ex rel, v. Hirstius.

prove of the present legislation upon this subject. I am inclined to believe that I favor legislation similar to that enacted in 1896, found in 92 Ohio Laws, 602, particularly in so far as it relates to the expense of maintaining prisoners in the county jail. I am at loss to know what reasons were presented to the Legislature for the enactment of the present law relating to that subject. Whatever they may have been, whether they were good or bad, the Legislature passed the present salary law, found in 98 Ohio Laws, 89; and it is the construction of this act, and the other statutes involved in this action, which we are called upon to consider. Upon a consideration of all the law relating to this matter, I hold that Section 2997 gave to the sheriff, *in addition to his salary*, the allowances made to him by the county commissioners for keeping and feeding state prisoners confined in the jail of a county.

2. After the demurrer to the original petition was sustained, the plaintiff filed an amended petition, in which he set out in separate causes of action, covering both terms of the defendant Hirstius as sheriff, the amount of profit the defendant is claimed to have made in feeding state prisoners, the profit made by him in feeding United States prisoners, and the profit derived by him in feeding city prisoners; and he seeks a judgment against defendant Hirstius for all these profits made by him in feeding these various classes of prisoners.

I have already disposed of the claims in reference to state prisoners in following the ruling made by Judge Babcock, above referred to.

I confess at the outset that the remaining question, relating to the feeding of United States and city prisoners committed to the custody of the sheriff and confined in the jail of the county, is more difficult of solution. The determination of these questions, however, depends upon a reasonable and proper construction of Section 3179 of the code, and Sections 2977 *et seq.*, of the salary act.

Section 3179 provides that the sheriff is required to receive prisoners charged with or convicted of crime committed to his custody by the authorities of the United States, and to keep them

until discharged by due course of law. This section further provides that such persons shall be supported at the expense of the United States, while so confined in jail, and that the sheriff shall receive no greater compensation for the subsistence of such prisoners than is authorized to be charged for state prisoners. This section also provides for jail fees to be paid by the United States to the county commissioners.

This section of the code does not impose the duty of subsisting United States prisoners, committed to the jail of the county, upon the sheriff; yet I think the statute contemplates that the sheriff might contract with the United States authorities to perform this service; and if he should do so, he may provide to perform this service for any sum agreed upon, provided it did not exceed the sum allowed by law for feeding state prisoners. It seems clear to me that the United States authorities, and the city authorities, in the event city prisoners are committed to the jail of the county, could provide for their subsistence by contract with parties other than the sheriff.

There seems to be no dispute in this case between counsel, that if the sheriff subsist federal and city prisoners committed to his custody, without a contract with the federal and city authorities for payment for such service, he would be compelled to render this service gratuitously. His account could not be allowed as a valid claim against the county or state, as neither the county nor the state has incurred any obligation in regard to those classes of prisoners. When the jail fees are paid to the county commissioners, all claims of the county, in so far as imposed by Section 3179, are satisfied. There seems to be no warrant for plaintiff's attempt to recover the profit which he claims the defendant made in feeding federal and city prisoners. If the amounts received by the sheriff for rendering this service constitute an *allowance or perquisite* received by him under Section 2977 and Section 2996 of the code, then he should pay it *all* into the county treasury, and not merely the profit if any, made by him. What construction should, therefore, be placed upon these statutes in order to avoid absurd consequences and the doing of injustice to any of the parties involved in this action,

1914.]

State, ex rel, v. Hirstius.

as those consequences can not be presumed to have been within the legislative intent? In the first place it appears that under Section 3179 of the code there is no duty imposed upon the sheriff to subsist federal prisoners placed in his custody; and as I have already said, the federal and city authorities can make contracts with persons other than the sheriff for the subsistence of federal and city prisoners confined in the jail of the county. It is further clear to me, that if the sheriff provide subsistence for federal and city prisoners without a contract with the federal and city authorities, providing for compensation for the expense so incurred by him, he could not collect the said expense from the county or state, as they have incurred no liability in the matter, and have no *financial* interest in these prisoners other than to see to it that the jail fees are paid. The sheriff, however, can clearly contract with the federal and city authorities for the expense of subsisting federal and city prisoners committed to his keep, but is limited in the charge to be made for such service by the amount charged for feeding state prisoners as fixed by Section 2850 of the code. The presumption is, that this service so provided by contract will equal in value the amount which he undertakes by contract to receive for the same. Having already held that in the matter of feeding state prisoners, that the sheriff is not required to account to the county or state for the allowance made to him quarterly by the county commissioners, can it be fairly said that in this respect the Legislature intended to distinguish between state, federal and city prisoners? Was it intended by the Legislature that he should pay into the county treasury the amounts received for feeding federal and city prisoners, and retain the amount received for feeding state prisoners? If we are right in the conclusion that the sheriff may retain the allowances made to him for feeding state prisoners, it appears to me that it logically follows that it was never intended by the Legislature to classify in this respect the prisoners committed to his custody, and therefore require him to feed city and federal prisoners at his expense. Is it reasonable to say that the county and state having been put to no expense in regard to subsisting these pris-

oners, and incurring no liability in relation thereto, the sheriff should be required to pay into the treasury of the county the amounts received by him from the federal and city authorities in payment for the expenses he has incurred in subsisting these prisoners? In other words, is it a reasonable construction to place upon these statutes, which would result in holding that the sheriff must subsist these prisoners at *his own expense*?

The *only* reason urged why this money received by the sheriff from the federal and city authorities should be turned into the county treasury, is that the salary act, Section 2977 provides that all *fees, allowances and other perquisites collected and received by law*, as compensation for services, shall be for the sole use of the treasury of the county in which they are collected. The question therefore presents itself as to whether or not these amounts received by the sheriff for subsisting federal and city prisoners are *allowances or perquisites* collected or received by law. In my opinion the *fees, allowances and perquisites* referred to in Section 2977 and Section 2996 of the code do not refer to any *fees, allowances or perquisites, except such as are fixed by law for services and duties imposed by law upon the sheriff*. All these fees, etc., are to be collected by him and paid into the county treasury. These fees, allowances, etc., are fixed by Sections 2845-6 *et seq.*, of the code. The duty of subsisting federal and city prisoners not being imposed upon the sheriff *by law*, and any sum he may receive for such subsistence not being *fixed by law*, but his compensation arising only *from contract*, I am of the opinion that under the provisions of the salary act he is not required to turn said moneys into the county treasury. This must be so, or else we are bound to conclude that he must render this service for nothing. Should the court place a construction on these statutes, which would lead to this absurd consequence, and do an injustice to the defendant, when state and county have incurred no expense or liability in relation to such prisoners?

In the case of *Moore v. Girin*, 39 O. S., 661, the law is stated in the first syllabus:

"It is the duty of courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will

1914.]

State, ex rel, v. Hirstius.

avoid absurd consequences, injustice or great inconvenience, as none of these can be presumed to have been within the legislative intent."

Another consideration in construing these statutes, which the courts may take judicial notice of, is the construction which they have received by the executive departments or bureaus which have had to deal with these matters. *Sutherland on Stat. Con.*, Section 474; *Dutoit v. Doyle et al*, 16 O. S., 400-407; *Wark v. Carrington*, 34 O. S., 64-75; *State, ex rel. v. Akins*, 18 C. C., 349; 116 Mo., 196; 72 Fed., 46; 152 U. S., 211-221.

The state bureau of inspection and supervision has repeatedly examined and approved the accounts of the sheriff of Cuyahoga county relating to the keeping and feeding of prisoners, and it has uniformly approved said accounts. As late as January 25, 1913, the chief of the bureau wrote as follows:

"That the matter of the payment of the board of prisoners to the sheriff and his authority to retain the same for his own use always seemed so clear to us that we have never asked the legal department of the state for an opinion, and we never had the matter questioned."

Counsel for defendant sets out extracts in his brief from several reports made by the bureau at different times, all going to show that a construction of the statutes under consideration here, favorable to the claims of the defendant, has always been placed upon them by those having to deal with them.

Taking all these matters into consideration, I am of the opinion that the defendant, Hirstius, is entitled to retain the payments received by him for the subsistence of federal and city prisoners committed to his custody and confined in the jail of the county.

3. The defendant, Hirstius, urges another ground of objection to the several causes of action set out in the amended petition, which I believe deserves attention. The plaintiff seeks to recover the profit which he claims the defendant made in "feeding prisoners." The compensation awarded the sheriff by law is for the "keeping and feeding" of prisoners. This is particu-

larly true when it relates to those claims made in so far as state prisoners are concerned. I am of the opinion that the word "keeping" is not identical with the word "feeding"; and that each word provides for separate and distinct services, which should be taken into consideration when dealing with the matter set out in the various causes of action in the amended petition. *In the Matter of the Claim of Loyd N. Lease, ex-Sheriff, etc.*, 4 C. C., 3.

I am, therefore, of the opinion that it is not sufficient to constitute a cause of action based upon these statutes, when no mention is made of a part of the service provided for in the statute and for which compensation is allowed.

For all the reasons set out above, I sustain the special demurrer to plaintiff's amended petition.

1914.]

Railway v. Wilson.

DEMURRAGE CHARGES FOR AN UNREASONABLE PERIOD.

Common Pleas Court of Wood County.

THE TOLEDO & OHIO CENTRAL RAILWAY COMPANY v. HARRY L. WILSON.

Decided, June 23, 1913.

Railways—Refusal of Consignee to Accept Car Load of Coal—Demurrage Charges thereon for Sixty-eight Days Disallowed.

Where a consignee refuses to accept a car load of freight, the railway company must make disposition thereof within a reasonable time, and a demurrage charge on the car so detained can be made only for such reasonable time.

*Doyle & Lewis, for plaintiff.**Stevens & Reed, contra.*

BALDWIN, J.

The parties waiving a jury this cause was submitted to the court upon the pleadings and the evidence.

Plaintiff asks to recover demurrage upon a car loaded with coal, shipped from the Cambridge (Ohio) district to the defendant at Prairie Depot, Ohio. Plaintiff claims for sixty-eight days at a dollar per day, and says that the car was delivered at its destination and the defendant notified thereof on July 21st, 1909; that defendant refused to accept the shipment and it remained on the car until October 8th, 1909, when the coal was sold by plaintiff. The freight charges on the shipment were \$46.96. The coal sold for \$50, leaving a balance of proceeds of \$3.04 which sum plaintiff credits on the demurrage charge and prays judgment for \$64.96 and interest.

It is established by the evidence that the defendant ordered this coal to be shipped to him f.o.b. car at Valley Mine in the Cambridge district, on the line of the Pennsylvania Company; that defendant was notified of the arrival of the car immediately

and upon inquiry then made was informed that the freight charge was \$1.60 per ton. The defendant immediately and upon the next day after the arrival of the car positively and unequivocally notified the plaintiff's agent at Prairie Depot that he would not pay the rate demanded, and that he would not pay any rate exceeding \$1 per ton, and that he would not accept the shipment for the reason solely that the rate exacted was excessive. Whereupon some correspondence was had between the plaintiff and the shipper concerning it, and several communications between the plaintiff and the defendant, the latter always and consistently declining to accept the shipment. Thus the matter drifted along until the plaintiff sold the coal.

One of the questions arises upon the legality of the freight rate demanded. From the evidence adduced on behalf of plaintiff it appears that the shipment was routed from the mine over the Pennsylvania lines via Tiffin to Toledo, thence over the line of the plaintiff to Prairie Depot and that there was no legalized joint rate in effect from the Cambridge district to Prairie Depot, and consequently the rate was made up by combining the local rate of \$1 from the mine to Toledo, and sixty cents from Toledo to Prairie Depot. The defendant claims the legal tariff rate would be \$1 and that if the car had been routed via the Pennsylvania road to Tiffin, B. & O. to Fostoria and plaintiff's line to Prairie Depot, the joint rate would be \$1, or that a combination local tariff by that route would have amounted to \$1. In support of this claim defendant offered in evidence two letters of traffic agents of the Pennsylvania, and the B. & O., and a circular of the Pennsylvania setting forth coal rates, issued May 1st, 1912. Plaintiff objected to the introduction of these documents and ruling was reserved. The letter of the Pennsylvania agent bears date of October 25th, 1912, and in connection with the circular to which it refers purports to give the new prevailing rate of \$1, but this is three years later than the shipment in question, hence if otherwise competent it would not be relevant to the issue. The letter of the B. & O. agent to Tilton & Son, dated March 3d, 1908, would seem to indicate that there was a legalized rate of \$1 from the Cambridge district to Prairie

1914.]

Railway v. Wilson.

Depot, in effect prior to this shipment. But manifestly the proof offered is incompetent. It is not a published tariff, such as might be competent under the provisions of the General Code. All these documents offered are in the nature of hearsay, and for that reason must be excluded. This leaves us with no evidence upon this question other than that offered by plaintiff and from that the finding necessarily follows that the legal rate on this shipment was \$1.60 per ton and plaintiff had the right to exact the freight charge which it did.

This conclusion renders the defendant liable in the action, but the question arises, what is the extent of his liability? For how long a time is he liable for demurrage under the circumstances of this case? No precedents are cited, and the limited search I have been able to make has developed nothing directly in point. It must be determined by the application of general principles. By the contract of carriage, when the shipment is delivered f.o.b. the consignee either expressly or impliedly obligates himself to accept and remove the shipment from the car of the carrier, either within the time stipulated in the contract of carriage, or if no time is stipulated within a reasonable time. If the consignee fails to do this, it constitutes a breach of his contract with the carrier, and such breach gives the carrier an immediate right of action for the damages resulting. By universal custom, a per diem charge for the detention of the car beyond a certain limit is imposed by the carrier, and this charge or demurrage is sanctioned by the statutes of Ohio. Usually the demurrage is fixed at so much per day, either by express provision of the contract, or a known rule of the carrier, but without stipulation as to the duration of the per diem charge. It is in the nature of liquidated damages for each day of detention.

Where, as in this case, the consignee positively refuses to accept the shipment, and there is no agreement or stipulation as to the time for which the consignee shall be liable for demurrage, a limitation must be fixed in some manner; it can not run indefinitely. Neither can the carrier justly assume to fix the time either arbitrarily, or to suit its own pleasure or convenience. If in this case the plaintiff has the right after refusal of the ship-

ment to allow the car to stand and collect damages for sixty-eight days, why not for sixty-eight weeks or sixty-eight months? To permit the carrier as of right to determine and fix the limitation would lead to absurd results. The plaintiff was informed and knew that the coal would not be received by the defendant. It could as well after conferring with the shipper and ascertaining that neither would take it, have made immediate disposition of the coal by way of sale or otherwise, as to wait sixty-eight days before making the sale.

It is a rule of general, if not universal application, that where by contract something is required to be done, but the time for doing it is not fixed by convention of the parties, it must be done within a reasonable time, and in like manner a subsisting legal duty devolving upon a party, which is ripe for performance, must be performed within a reasonable time.

Upon the breach of this contract by the defendant, he immediately became liable to plaintiff for the consequent damages. But the plaintiff had no right either through negligence or wilfulness to enhance the damages. The law imposes upon a party subjected to injury by a breach of a contract, the active duty of making reasonable exertion to render the injury as light as possible. If such party fails to do this, and by reason of such failure, the damages are unnecessarily enhanced, he must bear the increased loss. This doctrine was applied to cases presenting questions of similar nature in *Telegraph Co. v. Cereal Co.*, 3 C.C.(N.S.), 259; *Furniture Co. v. Robinson*, 7 N. P., 289, and cases cited, and we think it may be properly applied to this case.

Under this view it was the duty of the plaintiff within a reasonable time after the shipment was refused to make disposition of the coal. Time should be allowed for the plaintiff to confer with the shipper regarding it, and to give notice to both shipper and consignee of the disposition to be made of the coal whether by sale or otherwise. Fifteen days beyond the time fixed by contract for unloading the coal would be ample and reasonable time to accomplish this and stop the accumulation of demurrage. And this time at the rate charged of one dollar per day is the extent of the damage or demurrage for which the defendant is

1914.]

Luttner v. Cleveland.

liable, because after the expiration of such reasonable time defendant did not detain the car.

There is no claim or proof of damage from any other source. The plaintiff admits a credit of \$3.04 should be applied thereon. Consequently the finding and judgment is for the plaintiff for \$11.96, which with interest thereon to the first day of the term amounts to \$14.60, which latter sum the plaintiff will recover with its costs. Judgment accordingly.

COMPENSATION TO DE JURE OFFICERS.

Common Pleas Court of Cuyahoga County.

JOHN LUTTNER V. THE CITY OF CLEVELAND.

Decided, March 19, 1914.

Municipal Corporations—Policemen Wrongfully Dismissed from Force Sue for Recovery of Their Salaries—Payment to a De Facto Officer Bars a De Jure Officer from Recovery—Earnings by De Jure Officer from Other Sources—Estoppel—Res Judicata.

1. A decision in a given case is not *res judicata* in another similar case and does not estop other persons who are similarly situated from prosecuting their separate and distinct legal rights.
2. Where a *de jure* officer has been paid the salary attaching to such office, the *de jure* officer can not enforce payment to him of the amount falling due while he was excluded from the office.
3. The general current of authority is to the effect that a *de facto* officer can not maintain an action for recovery of salary, but where the salary has been paid to the *de facto* officer the *de jure* officer may maintain an action for its recovery from him.

M. B. Excell, F. F. Gentsch and Charles Savage, for plaintiff.
John N. Stockwell, contra.

VICKERY, J.

This case was heard upon an agreed statement of facts, which in effect show that Luttner was, prior to the 25th day of April, 1911, a policeman in the city of Cleveland, and on the day last above mentioned was suspended by the chief of police of Cleveland; and that thereafter, on the 5th day of May, the director

of public safety adjudged the plaintiff guilty as charged in the charge preferred against him, and dismissed him from the police force; and thereupon the plaintiff appealed to the civil service commission of the city, and on the 16th day of May, 1911, the civil service commission found the plaintiff guilty of the charges against him and affirmed the judgment of the director of public safety, dismissing plaintiff from his position on the police force. And thereafter, on the 22d day of June, plaintiff filed his petition in the court of common pleas, asking for a writ of mandamus to compel the city of Cleveland and the director of public service to restore the plaintiff to his position on the police force; and that on the 16th day of December, 1912, the court of common pleas refused to issue the writ and dismissed the petition of plaintiff; and that thereafter on the — day of June, 1913, the court of appeals, after hearing duly had, issued the writ of mandamus against the city and the director of public safety, reinstating the plaintiff to his position upon the police force; that on the 22d day of July, 1913, the plaintiff was duly reinstated to his position upon said force by the city authorities.

At the same time that this plaintiff was suspended, one Henry Lang, likewise a patrolman, was suspended, and also one Arthur Cottrell, and Peter J. Esper, and Fred W. Yoes; and the same proceedings in every particular were had in the cases of these respective men as were had in the case of the plaintiff Luttner; and the five cases have all been heard together, and the decision in one will be a decision in all of the cases.

It seems that prior to the 25th day of April, 1911, some friction had existed in the police department with respect to certain members of the police force belonging to a club called the Forum Club; and that each of the parties, in the respective cases to which I have called attention, were members of this club; and they, together with one other patrolman, who was removed at the same time and under the same conditions, to-wit, Charles Savage, undertook to do certain things for which the chief of police sought to discipline them; and the men whose names I have mentioned, together with said Charles Savage, were removed from office in the manner that I have outlined; and about the time, perhaps at the same time that these cases were filed, Charles

1914.]

Luttner v. Cleveland.

Savage likewise filed a suit in the court of common pleas asking for a writ of mandamus to compel the director of public safety and the city of Cleveland to reinstate him in his position, which writ was refused by the court of common pleas, and an appeal was taken to the then circuit court, the predecessor of the court of appeals, and a later decision was rendered by the circuit court; or perhaps it was taken on error to the common pleas court and was affirmed by the circuit court; at any rate it closed the litigation in that case, as the case was not carried to the Supreme Court. Subsequently, after the circuit court had gone out of existence and was succeeded by the court of appeals, and the personnel of said court having been changed, these cases under discussion were taken for review to the court of appeals. The court of common pleas naturally in these cases followed its own ruling in the Savage case, which ruling was affirmed by the circuit court; but the court of appeals reversed the holding of the circuit court, or, rather, it may be more proper to say that they refused to be bound by the ruling of the circuit court, and reversed the common pleas court and directed that these men be reinstated as set up in the journal entry attached to plaintiff's petition filed herein.

When the civil service commission had affirmed the findings of the director of public safety, and vacancies were found to exist in the offices held by the plaintiff and his fellows, that fact was certified to the civil service commission, and on the 8th day of June each of the vacancies was filled by an appointment, the plaintiff's successor being George A. Ress, who qualified on the 8th day of June, 1911, and held the office and drew the salary of such office from the 8th day of June down to and including the 22d day of July, 1913, at which time the plaintiff was reinstated in the said office. The plaintiff thereupon brought this action to recover the salary he would have earned from the time of his suspension down to the 22d day of July, 1913; and it is agreed between the parties that \$2,655.50 would be the sum thus coming to him, if he is entitled to recover for the period of his wrongful exclusion from his office. There being no dispute as to the facts in the case, it becomes merely a question of law as to his right to recover.

Plaintiff's action is for money only, and it sets up a claim for money. It alleges, among other things, that the court of appeals, in its findings, had decided the question that the plaintiff, Luttner, was entitled to the full sum of money that he would have earned had he been permitted to remain in his office. It is argued with some vehemence that this court is precluded from considering that question, but I am compelled to take a different view. Whatever the court of appeals may have said in this respect, it could be no more than *dicta*, because the question was not before the court, it was not argued, as I understand, before that court, nor could it very well be argued, because the case was simply a suit in mandamus to compel the city and the director of public safety to reinstate the man and restore him to all rights that he may have lost by reason of his wrongful expulsion. Of course, if it had been conceded that the amount was liquidated and there was no question as to the amount that should come to the plaintiff, or if the city auditor had issued a warrant and then the proper disbursing officer had refused to honor the warrant, mandamus might have been a proper remedy. That was not the situation, and of course whatever may have been the views of the court of appeals upon this question, they would not be binding in this case because that question was not before it.

Now, in answer to the claims made by the plaintiff, it is claimed by the city, first, in the case in which the rights of Savage were determined—the circuit court having determined that Savage, who was removed under exactly similar circumstances and for the same reason, was rightfully removed—that they then had the right to rely upon such decision, and that therefore the decision in that case was a complete defense; I can not take that view of the first defense. I do not think that the decision in one case could in any way be *res judicata* in another case, or that it would estop other persons who were similarly situated from prosecuting their separate and distinct legal rights that they might have, however authoritative that decision might be in controlling the actions of the city authorities. So I hold that the first defense is no defense in law.

1914.]

Luttner v. Cleveland.

The defendant, the city, sets up as a second defense, that after the board of civil service commissioners had sustained the director of public safety, and the plaintiff was removed from office, a vacancy was created, and on the 8th day of June, Ress was appointed to fill that vacancy, and filled it, as I have already said, up to and including the 22d day of July, 1913; and that he was a *de facto* officer, and the city having paid such officer, the *de jure* officer could not again draw his pay from the city. This raises a very serious defense to this action, and the one to which I will devote most of my time.

The city also sets up a third defense, that during the time of the plaintiff's expulsion from office he earned money on the outside. I believe the answer to interrogatories shows that the plaintiff drew \$525 in outside employment; and the city in its third defense says, that if the court should find that the plaintiff was entitled to recover for the time that he was ousted from office, then there should be a deduction from the amount thus coming to him equal to the amount earned by him, and he should only be permitted to recover for the difference.

Upon this question authorities are quite divided, and I shall discuss this defense only incidentally as it might bear upon the equities of the parties if the second defense is found to be a good defense.

Referring now to the second defense: It is contended that this is still an open question in the state of Ohio; that the decisions upon this question in this state do not quite decide the question at bar, outside of the decision of our court of appeals in this very case and one of the courts down the state who followed that decision; and, as I have said, in my judgment the court of appeals did not have that question before it.

The case of *Carter v. City of Columbus*, which was decided by Judge Evans of the Franklin County Common Pleas Court, falls a lot short of the proposition here. Judge Evans held in the Carter case, that Carter, who was chief of police and had been wrongfully removed and afterwards reinstated, was entitled to draw about a month's salary, that being the time occupied by the man who had been appointed by the mayor to super-

cede him, because the *de facto* officer had not drawn it; and before I get through I will seek to show that that makes quite a difference with respect to what ought to be holding in cases of this character.

There is one thing that strikes a candid mind on starting out to investigate this question. Some very respectable courts are diametrically opposed to each other, but there seems to be a general unanimity amongst the courts that have passed upon this question, that where a *de facto* officer has not drawn the salary attached to the office, the *de jure* officer would be entitled to that pay. Indeed, quite a number authorities hold, perhaps most of them, that the *de jure* officer would have a right of action against the *de facto* officer if he had drawn the pay. So the question becomes a very important question, as to whether the *de facto* officer had actually drawn the compensation attached to the office. One of the earliest and strongest cases upon this kind of a case is the one decided in the state of Michigan in the 20 Mich. Rep., being *Auditor v. Benoit*. In that case Benoit and Miller were candidates for the office of treasurer of Wayne county in the general election of November, 1866. Miller was declared elected by the board of county canvassers, and was inducted into office in January, 1867, and continued in the performance of his duties as such officer until November, when he was ousted by judgment of the court upon an information filed against him by Benoit, who thereafter was inducted into said office and continued to hold the same until January 1, 1869. At the close of his term Benoit claimed a salary for the entire term; but the board of county auditors, upon Miller's settlement, allowed him to deduct from the amount to be turned over to his successor a sum equivalent to his salary for the time he performed the duties of treasurer of the county, and therefore refused to permit Benoit salary for the entire term; and when he settled he sought to retain this amount for himself, and a suit was brought by the county against Benoit and his bond to recover the sum of money thus retained by him; and so the question was as to whether, the salary having been drawn by a *de facto* officer, the *de jure* officer could afterwards recover the same amount again from the

1914.]

Luttner v. Cleveland.

county. Judge Campbell, in a very well considered opinion, held that he could not. The only reason why I revert to this case is because it is argued very strongly that Judge Cooley rendered a dissenting opinion in the case, and that dissenting opinion is referred to a great many times in the books. I think that, on a close study of Judge Cooley's opinion, one can not help coming to the conclusion that Judge Cooley regarded that the county auditors, in permitting Miller to retain the salary out of his settlement, had voluntarily paid the *de facto* officer after it had been determined by a court that he was not entitled to hold the office. At least that is his argument. Indeed Judge Christiancy, in a brief opinion, stated that if it had been clearly proven that such was the fact, then he would have agreed with Judge Cooley; that in that event Benoit would have been entitled to the payment, even though Miller had drawn the salary attached to the office; but, not being absolutely clear that that was the case, he would have to agree with the majority of the court. Of course Michigan, very many years later, affirmed this doctrine by a unanimous court; and it is now conceded by counsel for the plaintiff in this case that Michigan is clearly against it; and I only dwell thus long on the Benoit case because of the argument with respect to Judge Cooley's dissenting opinion.

It is argued that the salary is attached to the office, and that whoever is entitled to the office is entitled to the salary which is attached to the office. Now, let us see, what is a public office? and who is a public officer?

Mechem on Public Offices and Officers says:

"A public office is the right, authority and duty, created and conferred by law, by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

It differs, as I will show and as the authorities all hold, from employment under a contract.

Now, what is a "portion of the sovereign power" given to an individual or an officer for? Why, clearly for the benefit of the

public. I know it is sometimes claimed that a public office is a private snap, but I think the authorities hold that a public office is a public trust, and the man holding such office should hold it for the benefit of the public. Offices are supposed not to be created except with the object and necessity for them; and if there be a necessity, it is important that the duties of such office be performed; that when a vacancy occurs, either by removal or otherwise, the public will suffer unless the duties of that office are performed; and the duties of an office could hardly be performed unless the emoluments of the office went to the person who performed them. There is a great line of authorities from almost all the states which hold that where the duties of an office have been performed by one appointed or elected and inducted into office, even though it should afterwards be held that his occupation of such office was illegal, still he was a *de facto* officer, and his acts were legal and would bind the public which he represented; and that if his acts were legal, he was in fact an officer or a *de facto* officer, and the disbursing officer, he who will be charged with the duty of paying the salary, will be perfectly safe in paying the salary attached to that office to the incumbent who is performing the duties of the office, and that he will be protected in thus paying. He would not be liable upon his bond for paying out money wrongfully; and there is a long line of authorities to the effect that the public which he represented would not be obliged to pay to the *de jure* officer when it had been determined that he had been wrongfully removed from office. Indeed, it seems to me that the very interest of the public demands that this should be the rule. There are well-considered cases upon this question in Nebraska, Kentucky, New York, New Jersey, Connecticut, Michigan, Iowa, South Dakota, Kansas and Illinois, where, in *Bullis v. Chicago*, 235 Ill., 472, the court holds thus:

“Salary is incident to the title to the office, not to its occupation. And if one having a legal right to an office is wrongfully prevented by the city from performing the duties of the office, he may recover his salary for the period he was so prevented, *where it has not been paid to any other one performing the duties of the office*, and his earnings or opportunities to earn can not be shown by the city in reduction of damages.”

1914.]

Luttner v. Cleveland.

This I believe is a case relied upon by the plaintiff, but it will be noticed that I have underscored the words, "where it has not been paid to any other one performing the duties of the office." The inference from this language would be, that where it had been paid to another he would not be entitled to it, which would be directly in line with *Carter v. City of Columbus*, decided by Judge Evans of the Franklin County Court of Common Pleas.

This case in Illinois sustains the plaintiff's contention with respect to the third defense the defendant has set up. We find the same doctrine held in Colorado, and in 16 L. R. A. (N. S.), 794, which collates and reviews practically all the authorities upon this subject. I notice among the authorities quoted in the note to the L. R. A. case that *Steubenville v. Culp*, 38 O. S., 18, is given as one of the authorities. Nebraska holds likewise, also Arizona, Idaho, Louisiana, and other authorities.

Dillon, in his work on Municipal Corporations, Vol 1, Section 429, says:

"It is a general rule, which is asserted with practical unanimity, that if an officer of a municipal corporation * * * be wrongfully removed by the * * * removing authority, he is entitled to recover, provided the city has not paid any other person for the performance of the duties of the office. But for reasons of public policy, and recognizing payment to a *de facto* officer while he is holding the office and discharging its duties as a defense to an action brought by the *de jure* officer to recover the same salary, it is held in many jurisdictions that an officer or employee who has been wrongfully removed, or otherwise wrongfully excluded from office, *can not recover against the city for salary during the period when his office was filled and his salary paid to another appointee.*"

It would seem then, from the long line of authorities upon this subject, that, by almost the overwhelming weight of authority, a *de jure* officer can not recover the salary drawn by a *de facto* officer while said *de facto* officer was performing the duties of the office from which the *de jure* officer had been wrongfully evicted. There are some exceptions to this doctrine, Utah, Indiana, California and Maine, and perhaps others have held to the contrary doctrine. Some of these cases, an analysis will show,

were based upon decisions in other states, notably the Maine decision upon the New York cases; and apparently they overlooked the question as to whether the salary had been paid or not; but in the view that I take of this, that is the all important question. I think from most all the authorities, where the salary has not been paid to the *de facto* officer, the *de jure* officer is entitled to recover full compensation for all the time that he was out of office. It is needless to cite authorities upon this, for I have already alluded to several. In my judgment, discussion on this question has almost been precluded, if not entirely so, by the case of *Steubenville v. Culp*, 38 O. S., 18. In that case Culp was wrongfully removed from office, or rather, suspended by the mayor, who had authority to appoint during the vacancy, and that suspension would only be until the charges could be heard by the council. The council sustained the mayor, and then Culp was removed. Subsequently the council reversed itself and reinstated Culp. Culp brought suit for his salary during the time that he had been kept from his office, but it had been drawn by the man appointed to succeed him, and the Supreme Court of Ohio held that that being so, the city of Steubenville could not be made to pay him likewise; in other words, that the salary was attached to the office, and if the duties of the office had been performed by a *de facto* officer, who had drawn the salary, the city had performed its full duty in paying for the services thus rendered, and could not be made to pay again.

Plaintiff seeks to distinguish this case from the one at bar, or, rather, the one at bar from the Culp case; but I think the argument he makes is a distinction without a difference.

It is conceded, I think, by the majority of the decisions, that the *de jure* officer would have a right to recover his salary from the *de facto* officer. And it is conceded, I think, by the majority of these decisions, that a *de facto* officer could not maintain an action to recover from the municipality. An argument is made from that, *ergo*, the *de jure* officer should be permitted to recover from the municipality, whether the salary had been drawn or not by the *de facto* officer. I think that is rather a *non sequitur*.

1914.]

Luttner v. Cleveland.

I am now going to advert to the third defense; and I will state, in passing, that I do not think the third defense set up in the answer would be a defense, even though the amount earned was equal to or greater than the salary attached to the office, for I think that there is a distinction between an officer and an employee under a contract. If there has been a breach of contract and the employee has an action, it is an action for damages, not to recover necessarily the sum of money that he would have earned, but damages for breach of contract; and the amount of damages would be the amount that he had lost by reason of the breach. Indeed his duty would be to minimize the damages; and he could not sit idly by, when he might get like employment, and enhance the damages against his employer; and consequently, it would be his duty to get like employment if possible, and the amount that he earned while in such employment would go to minimize the damages. It is not so with respect to a public officer. It is based upon a contract of employment. He is an officer, which is evidenced by the fact that the court can restore him to that office, and has done so in this very case at bar. Not so in a contract of employment. The courts would have no power to restore to the position; all they could do would be to allow damages which would compensate the employee for the breach of contract.

So I do not believe the third defense sets up a good defense, and I have alluded to it thus fully only as it may have a bearing upon the conclusions I am compelled to reach with respect to the second defense.

Some of these men, whose cases I am now considering, earned nearly if not quite as much in outside employment as they would had they remained in the office of patrolman from which they were removed.

Now the city, by the agreed statement of facts, paid to the parties who were appointed to succeed the men removed the salaries attached to the positions, and the plaintiff in each one of these cases was earning money outside, and not performing the duties of his office. Of course it is agreed that they were ready and willing at all times to perform those duties, but it

would hardly seem right to give a premium to a *de jure* officer by allowing him to draw his salary for work that he did not perform and which was performed by another, and at the same time retain as his own large sums of money which he had earned.

I therefore arrive at my conclusions with less fear of doing an injustice to the plaintiffs, because the records in each of these cases show that the plaintiffs earned large sums of money, the plaintiff Luttner earning the smallest sum of any, to-wit, \$525.

I am therefore of opinion, and so hold, that from the 8th day of June down to the 22d day of July, inclusive, the plaintiff Luttner is not entitled to draw the salary attached to the office of patrolman, for the reason that Ress was appointed to succeed him and drew the salary of the office. The salary not having been drawn by his successor from the 25th day of April down to the 8th day of June, exclusive, the plaintiff is entitled to recover from the city whatever sum would be due for that period of time. And a like entry will be made with respect to each of the other plaintiffs. A judgment will be entered for each for the sum that each would be entitled to from the 25th day of April down to the 8th day of June, 1911, with interest from said date.

The costs will be adjudged against the city in each case.

1914.]

Cody v. Packet Co.

WORKMEN'S COMPENSATION ACT WITHOUT EXTRA-TERRITORIAL EFFECT.

Superior Court of Cincinnati.

WILLIAM CODY V. GREENE PACKET COMPANY.

Decided, April 22, 1914.

Negligence—Liability of Employer Under Action in Tort for Personal Injuries—Arising Outside of the State But in the Course of Employment—Where the Employer Has Paid Into the State Insurance Fund—Application of the Rule of Lex Loci Delicti.

Section 21-1 of the workmen's compensation act of 1911 (102 O. L., 524), has no extra-territorial application; and the provisions thereof depriving an employer of five or more workmen, who has not insured, of the common law defenses can not be invoked by a workman seeking to recover of his employer damages for injuries sustained in the course of the employment in West Virginia, although the contract of employment was made in Ohio where both parties were resident.

DeCamp & Sutphin and Gregor B. Moorman, for the motion.
A. L. Beaty and Millard Tyree, contra.

MERRELL, J.

The defendant moves to strike from the petition the allegation that the defendant his employer, at the time of the accident, employed five or more workmen and had not subscribed to the state insurance fund. The petition alleges that the plaintiff, at the time of the accident, was a resident of Cincinnati, Ohio; that the defendant company is an Ohio corporation, and that plaintiff entered the defendant's employ in the city of Cincinnati. The cause of action is contained in charges that the defendant failed to warn the plaintiff of danger; failed to provide him a safe place in which to work, and failed to furnish him safe appliances and a safe method of operation, whereby the plaintiff, a deck hand on the defendant's steamboat, received injuries at a place near Charleston, in West Virginia.

By the allegation which it is sought to have stricken from the petition, the plaintiff seeks to bring his case within Section 21-1 of the workmen's compensation act of May 31, 1913:

"All employers who employ five or more workmen or operatives regularly in the same business or in or about the same establishment, who shall not pay into the state insurance fund the premiums provided by this act shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment, caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees. * * * And in such action the defendant shall not avail himself or itself of the following common law defenses: *The defense of the fellow-servant rule, the defense of assumption of risk, or the defense of contributory negligence.*"

Manifestly the plaintiff has brought himself within the foregoing provision, if the same can be construed to apply to actions in tort which arise outside of the state of Ohio. The question is therefore presented whether this section of the act of 1911 has any extra-territorial effect.

The general rule is well settled that actions in tort for personal injury are transitory in their nature and are governed by the *lex loci delicti*.

Wharton on Conflict of Laws, Section 478b:

"The reciprocal rights and duties of the parties and the defenses that may be invoked to escape liability for a breach of duty, are governed by the law of the place where the tort occurred, rather than by the law of the forum. This principle has been applied *inter alia* to reciprocal rights and duties of master and servant."

Minor on Conflict of Laws, Section 197:

"Not only does the *lex loci delicti* control the plaintiff's right to sue and the grounds of his complaint, but the same law usually governs the defenses which may be made by the defendant. It should be noticed that the courts are more chary of applying exceptions to the complete operation of a foreign *lex delicti* when it is the ground of the defendant's defense than when it is the

1914.]

Cody v. Packet Co.

ground of the plaintiff's complaint. Few cases are found in which the defense of the alleged wrongdoer, based on the *lex delicti*, has been swept away by the courts in the maintenance of the supposed policy of the forum, though perhaps in extreme cases such a step might be justifiable." *Alabama Great Southern Ry. Co. v. Carroll*, 97 Ala., 126; *Turner v. St. Clair Tunnel Co.*, 111 Mich., 578; *Rick v. Saginaw Bay Towing Co.*, 132 Mich., 237; *Baltimore & Ohio S. W. R. Co. v. Jones*, 158 Ind., 87.

In the absence of apt language in the act such as would clearly indicate a legislative intent that the act should be given extra-territorial effect, it is well settled that the operation of the act will be confined to state limits. It was so held of the British workmen's compensation act. *Tomalin v. Pearson* (1909), 2 K. B., 61; *Hicks v. Maxton* (1907), 124 L. T., 135; and of the Massachusetts compensation act, *Gould's case*, 215 Mass., 480.

If Section 21-1 of the act of 1911, standing alone, were under consideration, the accepted doctrines above stated would dispose of the present issue. It is, however, contended that taking the entire act in all its provisions as one, the legislative intent is declared to extend its operation beyond the state limits to all cases where the relation of master and servant arose or was created within the state. Thus in Section 20-1 of the act it is provided:

"Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employee, *wherever occurring*, during the period covered by such premiums, provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employee of his right of action as aforesaid."

Assuming for the moment, that the phrase "wherever occurring" found in Section 20-1 may by implication be read into the

provisions of Section 21-1, the question of the extra-territorial effect of the act as to its punitive provisions is squarely presented. In such case, that is to say, assuming that the phrase "wherever occurring" can by implication be read into Section 21-1 of the act of 1911, the application of this statute to torts occurring beyond the limits of the state, can be predicated only upon a contract made in Ohio between the employer and the employee, wherein both consent, either expressly or by implication that the Ohio compensation act shall be incorporated in their contract.

If, in the present case, the contract of employment had been made in West Virginia where the plaintiff's injury occurred, the case would fall within the rule stated in *Alexander v. Pennsylvania R. R. Co.*, 48 O. S., 623, the second syllabus of which is as follows:

"Where in an action prosecuted in this state by a servant against his master to recover for personal injury resulting to him from the negligent act of another servant of the same master, it appears that the accident causing the injury occurred in the state of Pennsylvania, that the contract of employment was made in that state, and that all the stipulated services were to be performed therein, no recovery can be had if by the laws of Pennsylvania, no right of action arose from the transaction; though the laws of Ohio would give full relief had the transaction occurred within this state."

In the present case it is claimed that the fact that the contract of employment was entered into in Ohio requires a different conclusion; and that, because of this fact, the parties will be deemed to have contracted that the law of Ohio should control in a determination of the rights of one of them against the other in an action in tort arising outside the state but in the course of the employment.

This doctrine has been vigorously criticised and repudiated in certain jurisdictions, as for example, in *Alabama Great Southern Ry. Co.*, 97 Ala., 126, and *Kansas City, etc., R. R. Co. v. Becker*, 67 Ark., 1.

1914.]

Cody v. Packet Co.

In the view of the authorities last mentioned a simple contract of employment entered into between master and servant contemplates only the exchange of services for wages, and does not, in the absence of express stipulation, comprehend the adoption of the law of the place where the contract was made as applicable necessarily to the solution of actions in tort between the parties; that in such causes of action the relation of master and servant is to be regarded as one of status rather than of contract.

The present case, however, does not necessitate the adoption of either theory suggested, for it is clear that before applying the theory of a contract between master and servant to the solution of an action between them sounding in tort, there must exist a genuine contract in the first place, whereby the parties either expressly or by implication agree that the law of the place of contract shall apply to actions in tort arising out of the contractual relation. This is recognized by the Legislature in Section 20-1 of the compensation act of 1911 (and likewise in the act of 1913) wherein the exemption from suit of the employer who has insured is made dependent upon his contract with his employee, by the following words:

“Provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice shall be deemed a waiver by the employee of his right of action as aforesaid.”

No such contract, express or implied, can be inferred in the case of an employee who entered into or continued in the employ of a corporation which had not insured, under the act of 1911.

Such an employer, as for example, the defendant in the present case, was not required to, and presumably did not notify, his workmen of his failure to insure, and inasmuch as such employer, under the act of 1911, had his option whether to insure or not, it can not be said that a contract was fastened upon the parties by implication of law. To say of the plaintiff in this case that when he entered the employ of the defendant in July, 1913, he con-

tracted to receive compensation for possible injuries, out of the state insurance fund, or to have a cause of action against his employer, unhampered by the common law defenses is metaphysical and indulging in fiction.

Assuming, therefore, that Section 21-1 of the act of 1911 is to be read as though it contained the phrase "wherever occurring" impliedly transferred from Section 20-1, I conclude that in the present case there was no contract between the parties, in the sense referred to, and that their rights in a possible action between them arising *ex delicto* should be solved by the law of the place where the tort occurred, rather than by the law of Ohio.

Moreover, the assumption hitherto made that the provisions of Section 21-1, depriving the employer who had not insured of the common law defenses, contained by implication the phrase "wherever occurring" transposed from Section 20-1, is an unnecessary and violent one. In truth, the provision depriving the employer who has not insured, of the three common law defenses is coercive in its obvious intent. It is somewhat in the nature of a penalty. The Legislature may very well have intended to bring about a state-administered system of workmen's compensation by its voluntary adoption on the part of employers and enuring to workmen wherever employed, without giving to the penalties which are attached for non-insurance any extra-territorial application.

It is therefore rational to suppose that the protection granted employers who insured was given a scope which it was not seen fit to attach to provisions in the nature of a penalty. For this reason, the language of Section 21-1 of the act of 1911 should be read without unnecessary implication or construction, and being so read, this provision can not be said to have or to be intended to have any extra-territorial application.

The motion to strike is also urged upon the ground that the allegation referred to amounts to an anticipation of possible defenses and is therefore improper in the petition. This court has repeatedly held that where the parties are within the application of the statute the allegation in question has its proper place

1914.]

State, ex rel, v. Board of Assessors.

in the petition, as the legal equivalent of averments otherwise necessary negating the possible inferences of assumption of risk or contributory negligence which might render the petition demurrable; it is also proper to preclude a submission to the jury of the question whether the plaintiff's testimony gives rise to the presumption of contributory negligence. (*Geiger v. Moerlein Brewing Co., Court Index, April 20, 1914.*)

For the reasons first stated the motion is granted.

**WOMEN ELIGIBLE FOR APPOINTMENT AS DEPUTY
ASSESSORS.**

Common Pleas Court of Cuyahoga County.

STATE OF OHIO, EX REL JEANNETTE MORGAN, v. THE DISTRICT
BOARD OF ASSESSORS ET AL.

Decided, March 27, 1914.

Office and Officer—Deputy Assessors do Not Exercise Independent Public Duties—Are Controlled by a Superior—And are Not Public Officers—Trend of Public Opinion as to Performance of Public Duties by Women.

A deputy assessor of property for purposes of taxation, appointed under the Warnes law, is not an officer and the position which he holds is not an office within the meaning of the state Constitution; and a woman is therefore eligible to appointment to that position.

Dawley, Ewing, Counts & Terrell, for plaintiff.
Robert M. Morgan, contra.

STEVENS, J.

The question to be decided in this case arises upon demurrer to the relator's petition for a writ of mandamus. She prays that a writ of mandamus may issue commanding the board of district assessors to include her name on the pay roll of said board and

to certify her claim for compensation as a deputy assessor, she having been appointed from a list of eligibles furnished by the civil service commissioners, and having been removed by the board of district assessors.

The propriety of the particular remedy is not questioned by counsel, and all the salient facts in the case are admitted.

The relator was removed from her position and compensation denied her because the board of district assessors had been advised by counsel, subsequent to her appointment, that under the Constitution and laws of the state a woman is not eligible to the position of deputy assessor of property for taxation purposes, as provided by act of the General Assembly, passed April 18, 1913 (103 Ohio Laws, 786-804), and known as the Warnes law.

Article XV, Section 4 of the Constitution of Ohio provides that:

“No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector.”

Only male citizens, twenty-one years of age and having a prescribed residence, have the “qualifications of an elector,” according to Article V, Section 1 of the Constitution.

The sole question then to be decided is, whether the provisions of the Warnes law make the position of deputy assessor an office and its incumbents an officer. If such is the case, then the application of the relator must be denied. If such is not the case, then the application should be granted, for there has appeared neither in argument nor from any other considerations, any reason for denying to a woman, because she is a woman, such possible opportunity to engage in the public service.

To constitute a public office, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office thus created and defined, and not as a mere employee subject to the direction and control of some one else. *State, ex rel, v. Jennings*, 57 O. S., 415.

1914.]

State, ex rel, v. Board of Assessors.

Authority and power relating to the public interests conferred by statute, and which may be vested in an individual by election or appointment, create an office. A public office is the right, authority and duty, created and conferred by law, by which an individual is invested with some of the sovereign functions of the government to be exercised by him for the benefit of the public. It implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. In its effects it will bind the rights of others and be subject to revision and correction only according to the standing laws of the state. The performance by a deputy or an assistant of many or indeed all of the duties of his superior does not of itself constitute such assistant an officer; and this may be the case even though the duties of the assistant are prescribed by statute. 7 O. S., 546; *Mechem on Public Offices*, Section 1; 52 O. S., 346, 356.

The foregoing, I think, include the essentials of the judicial definitions of an office, and it remains only to determine whether the provisions of the Warnes law bring the position of deputy assessor within the terms of the definition. I will not quote from that act in detail, but only so much as will fairly present the provisions which it is claimed on the one hand make the position an office, and which it is urged with equal confidence on the other hand refute that claim.

The district assessor is appointed by the Governor. He must be "an elector of the district." He appoints such number of deputy assessors as may be prescribed for his district by the tax commission. The deputy assessor holds his office or employment for such time as may be prescribed by the tax commission. The district assessor annually, under the direction and supervision of the tax commission, "lists and values for taxation all real and personal property subject to taxation in the county constituting his assessment district. * * * The deputy assessor shall have and perform, under the direction of the district assessor, and in such territory as may be assigned to him by the district assessor, all powers and duties of the district assessor," excepting certain duties prescribed by law and to which refer-

ence is made in the act. "The district assessor or his deputy shall perform or cause to be performed all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law" upon township, ward and precinct assessors, which latter positions the act abolishes. The correction of returns, the listing and valuation of omitted property, and various other powers formerly vested in the county auditor are entrusted to the district assessor. The district assessor makes up the auditor's tax list and the treasurer's duplicate. The district assessor examines and revises all returns of property, scrutinizes the valuation and corrects the statements or returns. "The salaries or compensations of deputy assessors and other employees of the district assessor shall be fixed by the district assessor, subject to the approval of the tax commission." The salary of the deputy is paid upon certification by the district assessor. The deputy is required to take oath "faithfully and impartially to assess all real and personal property in the territory assigned to him by the district assessor, and otherwise faithfully to perform all the duties imposed upon him, and impartially to exercise the powers vested in him by law."

Compounding now all of these elements with the others of like character detailed in the act, can it be said that there results an office within the meaning of the law?

We need not go behind the more recent decisions of our Supreme Court for the answer. The Jennings case (57 O. S., 415) names the requisite elements of a "public office."

(a) The incumbent must exercise certain independent public duties, a part of the sovereignty of the state.

(b) Such exercise by the incumbent must be in virtue of his election or appointment to the office.

(c) In the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

The position of deputy assessor does not measure up to these specifications. Plainly, it seems to me, his are not independent public duties. He performs his duties "under the direction and control of the district assessor, and in such territory as may be

1914.]

State, ex rel, v. Board of Assessors.

assigned to him by the district assessor." The provision that he shall have and perform, under such direction and supervision, all the powers and duties of the district assessor, is in effect only a provision which enables the district assessor to appoint deputies who shall assist him in the discharge of the extensive and detailed labor of listing and valuing property. All ultimate matters, all acts of "sovereignty," must be performed by the district assessor, and for them he alone is responsible. The relation, in its essentials, does not differ from that existing between the sheriff or the clerk and his deputies.

To say that the Warnes law throws about the shoulders of a deputy the robe of "sovereignty" is to indulge in a metaphor whose applicability the terms of the act and the entire tenor of the act, it seems to me, disclaim. The duties of the deputy are appointed to him by law, in the same sense as are the duties of any deputy who, of course, can not exercise them until he gets the "job." The difference in the provision as to duties is only one of more elaborate detail. It would be entirely within the power of the district assessor to withhold from the deputy the opportunity of engaging in the exercise of any of the duties for which he was appointed. This is clearly established under the provisions of Section 4 of the act. This being so, what becomes of the "sovereignty" of the deputy, of his "independent" right to exercise certain public duties, free from the "direction and control" of a superior?

In principle, a very close parallel exists between the case here presented and that of *Palmer v. Ziegler*, 76 O. S., 210, which holds that a superintendent of a county infirmary is not a public officer. An examination of that case shows that many duties were prescribed for the superintendent by the act which provided for his appointment, and these duties certainly require the use of as much discretion and the exercise of as much "sovereignty" as are required of a deputy assessor whose work is not much different from that of a gatherer of statistics.

To me, the conclusion is irresistible, that the position of deputy assessor is not "an office," and that the relator is entitled to the relief afforded by a writ of mandamus.

But if, as is sometimes the case, there appears to be such a diversity in precedents and such a conflict in authorities as to make difficult any certainty of opinion when based upon such authorities and precedents, there may be properly, it seems to me, a resort to other legally valid considerations.

Judge Welch, in rendering the opinion of the Supreme Court (25 O. S., 21, 25), when it held that a woman might be a deputy clerk of the probate court, said that the provisions of Section 4, Article XV of the Constitution, limiting the holding of office to those having the qualifications of electors, were "disenabling and should therefore receive a restricted rather than an enlarged interpretation." We are not required in this case to search precedents with a view to finding some judicially defined avenue of escape from disaster. No reason can be adduced to justify any possible claim that a woman can not perform the duties of this position as faithfully and efficiently as could a man. The relator's appointment followed upon her creditably passing a civil service examination. To bar her from such employment, unless the law clearly requires it, would be to exercise a discrimination which could be sanctioned neither by reason nor a sense of justice.

The trend of matured public opinion should also be considered in the application of legal principles and precedents to new conditions arising in the course of development of social and political ideas and measures.

The amendment to Article V, Section 1 of the Constitution submitted to the people in 1912, and known as the Women's Suffrage Amendment, would have made women eligible to office. The male voting portion of the population, whose privilege alone it was to pass upon this proposal, indicated rather decisively by its vote its unreadiness to accord the franchise to women. But the only feature of that proposal which was popularly discussed was its effect in giving women the ballot. There was no discussion of its effect in giving women the right to hold office; and that phase of it apparently received no consideration. A year later, however, there was submitted to the people a proposal expressly

1914.]

Cincinnati v. Fogarty.

making it possible for women to hold certain offices, and this amendment was adopted by an overwhelming vote. Whatever reluctance, therefore, may exist within the present body of electors toward making women voters has not been extended to a denial to the public of the benefit of the services of women in those public offices comprehended by the amendment.

I refer to these latter considerations, as I have indicated, simply for the purpose of calling attention to some of the aids to interpretation of the law to which resort may be had when conflicting precedents leave one in a state of doubt; but I am satisfied in this case to base my conclusions on the principles expressed and the precedents established by our Supreme Court.

A writ of mandamus may be issued in accordance with the prayer of the petition.

RIGHT OF A MORTGAGEE TO EJECT.

Common Pleas Court of Hamilton County.

CITY OF CINCINNATI v. WILLIAM FOGARTY ET AL.

Decided, January, 1914.

No Merger of Legal Title in Action on Note or in Foreclosure—Legal Title in a Mortgagee Distinguished from that in a Grantee—Rights Passing to the Successor in Title...

1. All the original rights between mortgagor and mortgagee, in the absence of a stipulation to the contrary, pass to their successors in title, whether the transfer be by deed or not, among which rights is the right to eject on condition broken.
2. The action or the right of action on a note secured by a mortgage is merged in the finding of the amount due in the action to foreclose. But there is no merger of the legal title in the action on the note or in foreclosure.

*John E. Fitzpatrick and Gideon C. Wilson, for Emil Homberg.
Hunt, Bennett & Utter, for Julia McGill Walters.*

DICKSON, J.

This court heretofore on the 15th day of October, 1913 (14 N.P. [N.S.], 599), rendered an opinion in this cause and an entry followed October 18, 1913, ordering defendant Emil Homberg's lien satisfied out of the fund in this court; then within three days defendant, Julia McGill Walters, who claimed to own this fund, filed her motion for a new trial, urging that the court erred in that decision when it said in syllabus 1:

"All the original rights between mortgagor and mortgagee, in the absence of a stipulation to the contrary, pass to their successors in title, whether the transfer be by deed or not, among which rights is the right to eject on condition broken."

Counsel for Julia McGill Walters claim that such a successor can obtain a legal title only by a formal conveyance and they complain because the conclusion reached in the syllabus was not raised by Homberg's counsel and not argued by any one.

If the point made by the court in that syllabus be wrong the decision must be changed with the result in favor of Julia McGill Walters and against Emil Homberg.

On November 17, 1913, it being made to appear to the court that more time was necessary to perfect error, the court set aside the distribution entry of October 18, 1913, and thereafter upon motion the hearing of the motion to distribute was reopened and additional evidence submitted and the claims urged in the motion again urged with other new claims, and arguments were heard and briefs submitted by both sides.

The word "successor" means "in the place of" and is broad enough to include "assignee." In Ohio even though the debt and the right to foreclose be outlawed there remains in the mortgagee his legal title and thus his right to eject (*Bradfield et al v. Hale et al*, 67 Ohio St., 316). This right is denied in most states by statute, notably in New York and in Michigan.

1914.]

Cincinnati v. Fogarty.

After all is said and done a mortgage, together with "its" legal title, is merely a security for a debt.

While a mortgage is in the form of a deed, still it is not a deed. In Ohio the word deed means a conveyance in fee simple. Text writers and some courts, all too freely use catching terms—really misleading, as a "mortgage-deed," a "*quasi-corporation*," "the common carrier is an insurer." A corporation is such or not, a common carrier is not an insurance company.

In Ohio a mortgagee or his successor has three ways of relief—action on the note or in foreclosure or in ejectment. If there thus be an election to foreclose and a finding therein, this finding by merger destroys the action on the note (*Brigel v. Creed*, 65 Ohio St., 40-45). But as we have seen in *Bradfield v. Hale*, *supra*, there can not be a merger of the legal title in an action on the note or in foreclosure.

The fiction that the legal title exists after the deaths of the debt and foreclosure obtains in Ohio. But this archaic survival, whether good or bad, is not passed upon, does not make the mortgage a deed. The fiction here exists to confound and confront the slothful debtor.

While it is true that land conveyed by deed is not reconveyed by a return of the price and the destruction of the deed (*Dukes v. Spangler*, 35 Ohio St., 119; *Jeffers v. Philo*, 35 Ohio St., 173; *Spangler v. Dukes*, 39 Ohio St., 642), and while it is true there can not be a reconveyance by a redelivery (*Baldwin v. Bank*, 1 Ohio St., 141), or by an assignment (*Bently v. DeForest*, 2 Ohio, 221), yet in Ohio there is no provision by statute, or holding, or *obiter* by the court; which forbids a change of minds and the return of the loan and the destruction of the mortgage.

The money consideration in a deed is money paid—not to be repaid.

The money consideration in a mortgage is money lent—to be repaid.

The recording statutes are for convenience in making titles marketable, good in innocent third parties, and do not aid us here.

Between those not affected by the recording statutes, including the successors of the original mortgagors and mortgagees, when the loan is repaid, the mortgage, as its name suggests, is dead, completely so, and with it the legal title in it.

We have thus seen that the legal title in a mortgagee is not the same as a legal title in a grantee by deed. It has not the same vitality. Hence, this court has no hesitancy in holding in the furtherance of justice that the strict rules of conveyance and reconveyance of a fiction applicable to deeds do not apply to mortgages. The court is aided in this view by the reasoning in the case of *Baird v. Ramsey et al*, 2 Ohio C.C. (N.S.), 492, wherein it was held that a mortgagee's assignee not grantee—meaning successor, whether by formal conveyance or not, could not eject a mortgagor, because the legal title had been destroyed by the twenty-one years statute of limitations—inferentially holding that such an assignee, were it not for this statute, could eject.

The order for distribution in favor of Emil Homberg will be again entered.

1914.]

Castle v. Mason et al.

VALIDITY OF THE OIL INSPECTION STATUTE.

Common Pleas Court of Franklin County.

CHARLES J. CASTLE V. WILLIAM F. MASON ET AL.

Decided, February, 1914.

Constitutional Law—Changing Conditions Do Not Render a Statute Invalid—Intent of the Legislature in Providing for Inspection Under the Police Power—Fees for Inspection in Excess of Cost Does Not Render a Statute Unconstitutional, When—Sections 844, et seq.

1. Where conditions so change as to render a law without reason or effect, it is the province of the Legislature to repeal it, rather than for the courts to attempt to strike it from the statute books.
2. The fact that services under a legislative act are not performed or are not necessary, but the fees provided therefor are regularly collected, does not imply a legislative intent to provide a revenue measure by indirection, which would not stand the constitutional test were its real purpose disclosed.
3. Surplus revenue, derived from inspection under the police power and paid into the state treasury to the credit of the general revenue fund, are not so excessive and disproportionate to the expense involved as to render the measure invalid on that ground alone where the surplus is not more than two or three times the expense incurred.

Wilson & Rector, for plaintiff.

T. S. Hogan, Attorney-General, contra.

EVANS, J.

This case is submitted on demurrer of defendant to the petition. The demurrer raises the question of the constitutionality of the legislative act of May 9, 1908 (99 O. L., 513), entitled "An act to provide for the inspection of oils, gasoline and naptha."

The petition attacks said act to regulate the inspection of illuminating oil, gasoline and naptha, and claims that said act is not a proper exercise of the police power of the state of Ohio, for the reason that danger to life and property from the proper

use of illuminating oil, gasoline and naphtha for years has not existed, and as now manufactured can not exist. The petition also, claims that said act is not one for the safety of the people of the state, but that it is in truth and in fact an act to raise revenue. That such is evidenced by the provisions of said act (Sections 853 and 865, General Code), providing that after payment of salaries due the state inspector of oils and his deputies and the expense incident to the conduct of his office, the state inspector of oils shall pay quarterly into the state treasury all moneys received by him under the provisions of said act, and more particularly by Section 865, General Code, which provides that gasoline and other products having a flash point less than that provided for illuminating oil shall be inspected by the state inspector of oils or his deputies, but providing no method of inspection nor standard of test to which it or any substance shall conform, but merely requiring the inspector to brand the same "dangerous," which service is of no benefit to the public and entirely unnecessary, but is made the means for collecting revenue.

The petition recites the fees collected under the provisions of said act from 1908 to 1913, together with the necessary expenses of said department. In 1908, the fees and revenue collected under said act amounted to \$56,815.67, the expenses, \$21,706.62. In 1909, the receipts were \$88,037.25, the expenses, \$36,999.91. In 1910, receipts were \$99,523.55, the expenses, \$39,548.65. In 1911, the receipts were \$107,972.38, the expenses, \$40,834.94. In 1912, the receipts were \$123,693.71, the expenses, \$42,576.73. Up to the date of filing the petition in 1913, the net amount of revenue paid in the state treasury under said act for said part of said year was \$74,996.37.

It is also averred that all kerosene oil in commercial use, and particularly that of the plaintiff, is absolutely non-explosive, and that there is no necessity and no demand for the inspection thereof, to promote the safety of persons who are using or may use the same, and that no test is made of gasoline, naphtha and like products.

1914.]

Castle v. Mason et al.

It it claimed that said act, and the requirement that plaintiff and others engaged in similar business shall comply with the same, and with the rules and regulations prescribed by said department, are illegal, oppressive, and contrary to the spirit and letter of the fourteenth amendment of the Constitution of the United States, in that it abridges the privileges and immunities of the citizens of the United States, deprives citizens of property without due process of law, and denies persons equal protection of the laws. Also, of Article I, Section 10, Clause 2, of the Constitution of the United States, in laying duties on imports or exports in excess of what is necessary for executing its inspection laws. And that it, also, contravenes the Bill of Rights of the Constitution of Ohio, which guarantees the right of acquiring and protecting property, for equal protection and benefits, and the right of the people to be secure in their persons and possessions against unreasonable searches and seizures, and that private property shall ever be held inviolate. And that it contravenes Section 2, and Section 5, Article XII, in that said statute pretends to charge fees for inspection, when, in fact, the fees charged and collected are far in excess of the actual or necessary cost of such inspection, and produces a large amount of revenue to the state over and above such actual, reasonable or necessary cost of inspection.

The prayer is for general relief by injunction, and that said act be held unconstitutional and void.

The state oil inspection act prior to the act of April 2, 1906 (98 O. L., 359), as embodied in Section 394 *et seq.* of the Revised Statutes, made no provision for the payment into the state treasury of any of the fees and revenue collected under the provisions of the act then in force.

It provided (Section 396, Revised Statutes) that all such fees and revenue shall be paid to said inspectors. This was their compensation for their services paid to them in fees charged for such inspection.

In 1906 Sections 395 and 396, Revised Statutes, were repealed, and by an amendment of said sections, said oil inspectors were

placed on salaries, and it was provided that the state inspector of oils shall pay into the state treasury, quarterly, all moneys received by him directly or through deputy inspectors under said act after paying the salaries and the expenses enumerated therein.

The act under consideration, being the act of 1908 (99 O. L., 513), contains the same provision as to salaries, and as to paying into the state treasury from fees and revenue under said act, in excess of said salaries and expenses, and, also, enacted Section 13 thereof, for the inspection of gasoline or like substances having a lower flash test than provided for illuminating oils, which, as above stated, is referred to in the petition.

It can not be seriously questioned but that the state oil inspection act prior to the amendment thereof by the legislative act of April 2, 1906, was clearly a police regulation, and that such was the legislative intent, for under the provisions of said act no part of the fees and revenues derived therefrom was paid, or intended to be paid, into the state treasury.

Do the legislative acts of 1906, and of 1908, which abolishes compensation in fees of said state oil inspectors, and instead thereof places said inspectors upon fixed salaries, and provides for the payment by said oil inspectors into the state treasury of all fees and revenue derived from said inspections under said act after payment of salaries and expenses therein provided, change the character of said measure from that of a license under the police power, into an act for providing revenue, and thereby a taxing measure, and was such the intention of the Legislature?

The claim that said act to regulate the inspection of illuminating oil, gasoline and naphtha is not a proper exercise of the police power of the state, is not a question that, under the circumstances of this case from the facts pleaded, should properly rest for determination by the courts.

The reason alleged in the petition why such regulation is not a proper exercise of police power, is that danger to life and property from the proper use of illuminating oil, gasoline and

1914.]

Castle v. Mason et al.

naptha does not now, and has not for many years, existed. That when inspection laws were first enacted the danger against which the law provided was the inclusion in the oil for illuminating purposes of a portion of benzine or naptha, by reason of the fact that at that time the price of illuminating oil was much higher than the price of gasoline, naptha and benzine; that, at present and for many years past the price of volatile constituents of petroleum has been two to three times that of illuminating oil, and therefore all such volatile portions are carefully separated from the illuminating oil in manufacture, and the former danger provided against does not now exist.

It can not be presumed that the conditions may not again change, and the demand for illuminating oil raise the price in excess of that of such volatile constituents. To infer that such a legislative act is intended as a revenue measure because of such changed conditions, if exercised by the courts, and the act declared invalid, would be predicated a decree upon conditions existing at the time of the decree, but which by a reversal of the conditions, which may occur at any time, such inference could not be drawn, and by reason of such reversed conditions the act would be valid.

I am of the opinion that it is properly the province of the General Assembly to repeal or annul its statutes whenever the necessity for so doing arises, and that the courts can not draw an inference of the legislative intent, and invalidate a legislative act, under circumstances such as we have in this case, because the Legislature has as yet passed no act recognizing such changed conditions.

Besides, adjudicated cases hold that courts will accept the determination of the legislative bodies as to the necessity for the regulation of the sale of such volatile by-products, and will not inquire into the necessity for such regulation.

In *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S., 380, the court say, that as to the contention that oil is not a proper subject of inspection, the court can not say that such a law has no reasonable relation to public safety and welfare, and

do recognize the dangers in the sale and handling of such oils and volatile products.

It is claimed that the provisions of Section 13 of said act of 1908, is of no benefit to the public and entirely unnecessary, but is made the means for collecting revenue for the state.

This is the provision of said act which provides that all gasoline, petroleum or similar or like substances, having a lower flash test than provided therein for illuminating oils, shall be inspected by the state inspector, and shall stamp on the package containing the substance a printed inscription of the name of such substance, the word "dangerous," the date of inspection, and the name of the officer making such inspection.

It is claimed that all the inspectors are required to do under that provision of said act is to brand the same "dangerous."

It is a mandatory provision of said act for an inspection of such products. The fact that the services required under said act were not performed, would not imply that the legislative intent was that they should not be performed, nor imply that the legislative intent was to provide a mere revenue measure.

If the provisions of Section 10 of said act do not provide a method of inspection and standard of test applicable to the products named in Section 13 of the act, then it is a matter for the Legislature to provide for any such requirements. The absence of such, or failure to make the inspection, or the want of necessity for such inspection, is properly a matter for the Legislature.

The most serious question presented by the demurrer is whether the amount of surplus revenue derived and paid into the treasury from said inspection is so excessive and disproportionate to the expenses as to indicate the intent to raise revenue for the state, and whether the act is not one for the purpose of inspection under the police power.

The petition shows that the revenue collected under the provisions of said act ranges from about two and one-half times the expenses in 1908, to slightly less than three times in 1912.

In the year 1912, the net revenue paid into the state treasury under said act was \$81,116.98.

1914.]

Castle v. Mason et al.

The petition shows an increase from year to year of the amounts paid into the state treasury. In 1908 the amount paid into the treasury from said collections was \$32,109.35; in 1909 was \$51,037.34; in 1910 was \$59,974.90; in 1911 was \$67,137.44; and in 1913, up to date of filing the petition in December, 1913, was \$74,996.37.

The fact that the receipts are found to average more than enough to defray the expenses incurred in enforcing a regulation measure does not raise a presumption of the legislative intent to create a revenue or taxing measure.

It could not be reasonably expected that the Legislature, which has the discretion of fixing inspection fees, could fix them to exactly correspond with the actual expenses incurred in administering the law, and for this reason it is not uncommon that the revenue derived is greatly in excess of the expenses incurred.

What is a reasonable fee must depend largely upon the sound discretion of the Legislature, having reference to all the circumstances and necessities of the case.

It will be presumed that the amount of the fee is reasonable unless the contrary appears upon the face of the law itself, or the facts established.

In *New Mexico v. Rio Grande R. R.*, 203 U. S. 38, Mr. Justice Day in the opinion says:

“The exercise of the police power may and should have reference to the peculiar situation and needs of the community, and is not necessarily invalid because it may have the effect of laying a tax upon the property affected, if its main purpose is to protect the people against fraud and wrong.

“The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the Legislature to fix the amount, and will only present a valid objection if so unreasonable and disproportionate to the service rendered as to attack the good faith of the law.”

The law in question does not specify any purpose for which said money so collected and turned into the state treasury from the fees for said inspection of oils shall be applied.

The court say in *Marmet v. State*, 45 O. S., 68, it would not necessarily follow, even if the law required the money to be

placed to the credit of the general fund, that the purpose of the law was exclusively the raising of general revenue, because no impediment exists to placing in one fund moneys intended for different purposes.

Neither does the statute show that the Legislature made a material increase in the collections under the law by an amendment thereof after it was demonstrated that before the amendment the collections paid into the state treasury were already excessive.

In this respect the case at bar differs from *Janes v. Graves*, cited in the brief, where it appears from the report of that case in 1912, the surplus from the collections for motor vehicles was \$276,155.10. This was the revenue after paying the expenses for administering the law.

The law in question in that case was the act of April 28, 1913, to take effect January 1, 1914. In the light of the great surplus under the former law the Legislature made a material increase in the license fees under the new law, the one there in question. Hence that case differs materially from the facts in this case. In the case at bar there is no increase in the fees for inspecting oils, and such manifestation of the legislative intent to create a revenue measure is not apparent in that respect in the oil inspectors law.

I am of the opinion that at the time of the passage of said oil inspectors act, there did not exist a legislative intent to create a revenue measure. A careful consideration of the act itself, and all the circumstances, indicate that it was intended to be a regulation for the inspection of oils for the public welfare and benefit.

Whether by reason of the gradual increase of the surplus paid into the state treasury since 1908, that said surplus has, under all the circumstances as pleaded, reached such a sum whereby the court would be justified in declaring the law a revenue measure, is the real question here for determination.

It is argued by defendant's counsel that a law, constitutional at the time of its enactment, remains constitutional unless the Constitution is changed.

1914.]

Castle v. Mason et al.

It is not necessary, and the court does not decide that question here, inasmuch as the conclusions reached are predicated on other grounds.

It may be well, however, in this connection, to call attention to the language of the court in *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S., 380, wherein the court say:

"What relief should be awarded in the event the Legislature failed in its positive duty in this particular is not a question open for consideration upon this record."

The Attorney-General has pointed out several sections of the statutes to show that the expenses for salaries for the inspectors and deputies, and the expenses incident to the proper conduct of the office, provided by said law, do not cover all the cost to the state for maintaining said department. The supplying said department with office rooms, printing and stationary, he claims are additional expenses that come out of the general revenue fund of the state. That the state also provides the time and services of the Attorney-General as legal counsel for the oil inspectors department when necessary; and, provides the services of the several prosecuting attorneys of the state, in enforcement of the penal provisions of the act, and the services of the professor of chemistry of the Ohio State University as an arbiter in dispute between the inspectors and dealers. How great a burden this devolves upon the state, and the additional cost to the state out of the general fund, does not appear. However that may be, I have reached the conclusion that the surplus fund paid into the state treasury under said act is not at this time so excessive and disproportionate to the expenses involved that it would justify the court in holding said statute unconstitutional. The facts pleaded fail to show a legislative intent to create a revenue law. While the surplus fund in the years specified show an increase from year to year up to the beginning of this action, I am of the opinion that the case falls largely within the reasoning and holding of the court in the *Red "C" Oil Manufacturing case (supra)*, wherein the court say that "if the receipts are found to average largely more than enough to pay

the expenses, the presumption would be that the Legislature could undertake the change."

In the Red "C" Oil case the surplus was more than double the amount necessary for the expenses of the inspection, while in the case at bar the net revenue paid into the treasury is some greater, but is less than three times the expenses.

My convictions are such that raise in my mind a doubt that the surplus is so large as to justify a court holding the law unconstitutional. In *Marmet v. State*, 45 O. S., 64, Judge Spear, in the opinion says:

"If the law, as to the provisions involved, is shown to be *clearly* and *palpably* in conflict with the Constitution, so that there is no doubt or hesitancy in the mind of the court, it should be so held. But if there is any doubt upon the subject, that should be solved in favor of the law, and the court should decline to interfere."

On the conclusions here reached it is not necessary to discuss the question as to this law being an excise tax if the court decides that the law is a tax. The conclusion reached by the court is that the law is not a tax, but it is an inspection regulation within the police power of the state.

One of the demurrers, or grounds of demurrer, is that the court has no jurisdiction on the subject-matter of the action. It is claimed that the action is in effect one against the state. I am of the opinion that the action is not in effect against the state, but is one against the state oil inspector, the officer who administers said department. The court has jurisdiction of the subject of the action. The demurrer raising the question of jurisdiction is overruled.

I am of the opinion that the said legislative act in question is constitutional.

The demurrer to the petition on the ground that the petition does not state facts sufficient, is sustained.

1914.]

Gaither v. Colter Co.

**SERVICE OF SUMMONS AT USUAL PLACE OF RESIDENCE
WHEN DEFENDANT IS ABSENT.**

Common Pleas Court of Hamilton County.

EDWARD G. GAITHER V. THE COLTER COMPANY.

Decided, March 20, 1913.

Action on an Account Contracted by Another than the Defendant—Summons Served at Defendant's Usual Place of Residence While He Was in Europe—Place of Abode Distinguished from Usual Place of Residence.

1. In an action to enjoin levying of execution on a magistrate's judgment and for the vacation of said judgment, fraud in procuring the judgment is not shown by evidence that plaintiff had denied liability on the account and defendant had charged it to profit and loss, where plaintiff is not able to show that notice had been received by the defendant not to sell any more goods on his account to the party who contracted the debt.
2. The fact that the defendant was in Europe at the time the summons was left at his usual place of residence, and as a consequence he was not aware that suit had been brought until judgment had been rendered against him by default, does not constitute an unavoidable casualty or misfortune preventing his making a defense, nor does it afford ground in equity for setting the judgment aside.

Cogan, Williams & Ragland, for plaintiff.

Brumleve & Moorman, contra.

MAY, J.

Plaintiff filed his petition alleging that the defendant recovered a judgment against him in the sum of \$88.95 and \$3.90 costs, and that afterward, on the 14th day of May, 1912, a transcript of said judgment as taken before M. R. Dempsey, justice of the peace, was filed for lien and execution in the court of common pleas in case No. 150590, and an order of execution was issued to the sheriff by the clerk of said court. Plaintiff further alleges that in the bill of particulars filed before the magistrate the defendant fraudulently represented and alleged that the

plaintiff was indebted to it for goods and merchandise, to-wit, groceries alleged to have been sold and delivered to the plaintiff by the defendant, but that said bill of particulars was in truth and in fact false; that the plaintiff was not indebted to the defendant either personally or by agent.

Plaintiff further alleges that he had no notice or knowledge of the taking of the judgment and that he was not served with process and did not authorize any attorney to enter an appearance, and at the time the action was instituted and at the time the judgment was rendered against him before the magistrate the plaintiff was absent from the city, and after that the defendant in this case, who was the judgment creditor, in fraud of the rights of the plaintiff, proceeded with the action before the justice and caused judgment to be entered. Plaintiff further said that he had no knowledge of the judgment until the 13th of July, 1912. The plaintiff prays for an injunction against levying execution on said judgment and for a vacation and setting aside of said judgment and for all other equitable relief.

The defendant in its answer admits that it was a corporation; that it had recovered a judgment for the amount set out in plaintiff's petition before the magistrate and that it had filed said judgment for lien and execution in the court of common pleas; and for further answer denies each and every other allegation not specifically admitted; and prays that it be dismissed and that the temporary restraining order be dissolved.

At the hearing the plaintiff testified that he had lived at 408 West Fifth street, where he conducted a hotel, known as the Douglas Hotel, and in the year 1907 the hotel was managed by a man named Brown; that prior to his departure for Europe in June, 1907, plaintiff had notified his creditors that he intended to leave the city, that they should not extend credit to any one on his behalf and that he had paid his creditors in full. Plaintiff also testified that during the year 1912, his usual place of residence was on the third floor front at 408 West Fifth street. Plaintiff also testified that he had personally called at the place of business of Colter & Company on Sixth and Main streets and told some one in the store whom he didn't remember, not to ex-

1914.]

Gaither v. Colter Co.

tend any credit on his account. Plaintiff also testified that before his departure for Europe in 1907, he had entered into a lease with Brown, his manager, by which Brown was to run the hotel and pay five dollars a day to plaintiff for running the hotel. Plaintiff also produced the porter, who is in charge of the building at 408 West Fifth street, and he testified that while the plaintiff was in Europe he always kept the door leading to the third floor locked and that no person could enter there without his consent or without getting the key from him, and that no constable or any other person entered there, and that he had charge of the rooms and he never found any summons under the door.

The defendant on its behalf introduced the original papers of the case in the magistrate's court. From these papers it appears that there were two summons issued in the case; the first was returned under date of March 22, 1912, and showed a service on the plaintiff at the usual place of residence. The constable testified, however, that he went to 408 West Fifth street, went into the saloon, asked for Mr. Gaither, was told that he was not in and that he left the summons with the barkeeper to be handed to him. On reporting this to the magistrate he was informed this was not a good service, and an alias summons was issued under date of March 28, 1912, and that he served this summons on the same day and made a return under date of March 29, 1912, at Edward G. Gaither's usual place of residence. He testified that he went to 408 West Fifth street, having received instructions that he should go up as far as he could, which was the third floor, that he did so and that he knocked on the front door and receiving no response, put the summons under the door.

The defendant produced three persons connected with the business, all of whom testified that they had never seen the plaintiff at the store and had never received any written or verbal notice from him not to extend any credit to Brown or to any one on his account. The books of the defendant company were also introduced in evidence and these showed that prior to the account sued upon the defendant had done business with Gaither and that Gaither had paid previous accounts. The ac-

count due in May was not paid until sometime in June. The testimony shows that the defendant did not know that Gaither was in Europe in March, 1912, when suit was filed before the magistrate, and there is no testimony whatsoever to show that the constable knew that Gaither was in Europe or that the defendant's attorney knew this fact.

I am therefore of the opinion that there is no evidence offered in this case whatsoever by which fraud is to be charged against defendant in the bringing of this suit in March, 1912. The fact that this account had been charged to profit and loss and that Gaither had been asked to pay it and had denied his liability, does not raise a presumption of fraud because the suit was brought afterwards. This proceeding is in the nature of a direct attack upon the judgment recovered before the magistrate, and it is a settled rule of law in this state in respect to domestic judgments of courts of general jurisdiction that, when it appears by the record that the court has found affirmatively the fact on which its jurisdiction rests, that such judgments can not be set aside, except for fraud, collusion, coercion, or some misconduct by means of which the defendant has secured an unconscionable advantage. *McCurdy v. Baughman*, 43 Ohio St., 78; *Dixson v. Bird Varnish Co.*, 21 Weekly Law Bulletin, p. 258, and cases cited there.

The plaintiff contends, however, that there was not proper service on him in this case before the magistrate, because he was absent from the city at the time of the service and because as a matter of fact the constable did not make the service.

As to the question of whether the service was made in accordance with the endorsement of the constable, the evidence of the constable is positive as to the manner in which the service was made, and the only evidence against this is the testimony of the porter who says the door was always locked and that he kept the key in his pocket and that he was always in the place. Inasmuch as the plaintiff must make out his case in a matter of this kind by clear and convincing evidence, he has not sustained his burden in that respect, and therefore I find that the service was made in accordance with the return of the constable, to-wit, at the usual place of residence. That this was

1914.]

Gaither v. Colter Co.

the usual place of residence of the plaintiff was admitted by the plaintiff himself, who testified that he occupied the third floor front and on his return from Europe in 1912, he went back to those rooms and that in the fall of 1912, he registered as an elector from the eighteenth ward, giving his residence as 408 West Fifth street. Plaintiff contends, however, that he was absent from the city and therefore there was no good service here. Counsel for both plaintiff and defendant have filed voluminous briefs in this case, and I have carefully examined all their authorities.

The defendant relies on Section 10237, General Code, which permits the serving of a true copy of the summons upon the plaintiff personally, or "by leaving it at his usual place of residence." The plaintiff contends that "usual place of residence" does not necessarily mean where the plaintiff sleeps, but where he is usually to be found, and because Gaither was not actually living at 408 West Fifth street at the time the summons was supposed to have been left, inasmuch as he was in Europe, there was no proper service.

To support this view three cases were cited, *Blackwell v. England*, 8 E. & B., 541; *Copeland v. Cunningham*, 12 W. Va., 750; *Berryhill v. Sepp*, 106 Minn., 458, at 459. In these cases the words used are "place of abode," and all of them place a narrower construction on place of abode than is placed in this state on the words used in the statute, "usual place of residence."

In support of defendant's contention that the constable's return is proper, and that a summons may be served on one though absent at the time of service, he has cited the following cases: *Henneman v. Thompson*, 8 S. C., 115; *Burbage v. American National Bank*, 95 Ga., 503; *Conwell v. Atwood*, 2 Ind., 289,

In the Indiana case it was held that where service of a writ is permitted at the place of residence, the fact that the defendant was absent in another state, and was not actually notified of the suit until the first day of the term when the summons were returnable, affords no reason for setting aside the return.

In addition to the cases cited by counsel, the court has found one Ohio decision bearing on this question, to the effect that ab-

sence at the time of service is no defense. In *Howard v. Abbey*, 1 W. L. Monthly, 278, the Cuyahoga Common Pleas Court held, the fact that a defendant is absent, out of the state, at the time of the service of summons by leaving a copy at the place of his residence, and is ignorant of the pendency of the action until after judgment against him by default, is not an unavoidable casualty or misfortune that did prevent him from making a defense.

The service in this case, therefore, being regular and no fraud being shown, it necessarily must follow that there is no power in a court of equity to set aside the judgment below.

The plaintiff claims that the equities of the case are with him, and that having shown that he was absent from the city, that this was such an accident that equity will relieve against on the facts presented. The authorities, however, do not bear out this contention.

In *Freeman on Judgments*, paragraph 532, it is laid down:

“The vacating or enjoining of a judgment by default is governed by the same rules and must be supported by the same cause which would be sufficient to vacate or enjoin any other judgment.”

Therefore, for the reasons laid down by the Supreme Court in *McCurdy v. Baughman*, 43 Ohio St., 78, where the court said that the enforcement of a judgment rendered by a justice of the peace upon default will not be enjoined, unless some equitable ground of relief be shown, such for instance, as fraud or coercion, unless such fraud is shown, relief must be denied.

As stated above, the examination of the evidence in this case does not show fraud on the part of the defendant, his agents or attorneys, or on the part of the constable or the magistrate. Furthermore, the plaintiff did not sustain the burden placed upon him to show in his direct attack on the judgment that the return was not duly made in accordance with the endorsements on the back thereof.

For these reasons, the relief prayed for will be denied and the petition dismissed.

1914.]

Joseph v. Larkworthy.

**AUTOMOBILES IN COLLISION AT A STREET
INTERSECTION.**

Common Pleas Court of Cuyahoga County.

FRED JOSEPH v. F. J. LARKWORTHY.

Decided, December 3, 1913.

Preferential Rights at Street Crossings—Provisions of the Cleveland Ordinance Relating to Vehicles at Street Crossings Construed—Common Law Rule Still in Force, When—Recklessness and Disregard of the Rights of Others on the Part of Automobile Drivers a Serious Menace.

1. It is negligence *per se* to drive in a much frequented or built up portion of a city a vehicle that is so covered or constructed or loaded as to prevent the driver having an adequate view of the traffic in the street on both sides of and following his vehicle.
2. Where a city ordinance gives to drivers on streets running east and west the right-of-way at street intersections over those on streets running north and south, or *vice versa*, the right so given is not exclusive but preferential only, and entitles the driver so preferred to cross first only in the event of his having first arrived at the crossing.
3. A driver of an automobile so preferred must in all cases give warning of his approach to a street crossing, and must have his car under reasonable and proper control; and the driver of a car on the intersecting street has the right to assume, upon arriving first at the crossing, that the machine which he sees approaching will be so handled that he may cross ahead of it without danger of a collision.
4. In the event of doubt as to which car arrived first, the common law doctrine applies, and each driver must use and exercise ordinary and due care to avoid injury to the other.
5. Where two machines, running on intersecting streets, attempt to make the crossing at an unlawful rate of speed and without regard to the rights of others, a claim for damages can not be maintained by either owner for injury to his machine in the resulting collision.

Elmer W. Waite, for plaintiff.

H. H. Anderson, contra.

FORAN, J.

This case came into this court on error from the municipal court. The parties will be here referred to in the same relation in which they stood in the court below.

The plaintiff, Fred Joseph, was the owner of a large touring locomobile seventeen feet long and weighing approximately two and one-quarter tons. The defendant, Fred J. Larkworthy, was the owner of an automobile of considerable less weight and size. During the afternoon of January 26, 1913, the plaintiff's car, in charge of one Sherbondy, his servant, was being driven westerly on Quincy avenue, an avenue running in a generally east and west direction, and a public thoroughfare in the city of Cleveland. Quincy avenue crosses and intersects East 79th street, also a public thoroughfare running in a generally north and south direction in said city. As the plaintiff's car approached East 79th street the defendant, driving his car in a northerly direction, approached Quincy avenue. Both cars reached the intersection of these highways at approximately the same time; both attempted to cross at practically the same moment, and as they apparently were going at right angles, the inevitable happened. The plaintiff's car was overturned and was badly injured. The defendant's car was also damaged, but not so seriously but that it was able to limp off and away from the scene of the collision on its own power.

The plaintiff began an action in the municipal court, alleging in the statement of claim that the collision was caused solely by the negligence of defendant. In a statement of defense the defendant denied that he was negligent, and averred that the collision was wholly due to the negligence of the driver of the plaintiff's car, and by way of counter-claim he asked damages from the plaintiff for the injuries sustained by his car. This was to be expected, for in a collision between two motor vehicles the man who is willing to admit that his own negligence was the sole cause of the collision has not yet been discovered.

Over two hundred pages of testimony were taken, all of which has been read and considered by the court.

The collision was witnessed by a number of persons on the street and in adjacent windows; but as the presence of an auto-

1914.]

Joseph v. Larkworthy.

mobile on the streets is no longer a novel or an unusual thing, persons are not paying much attention to them, and the testimony of onlookers as to what occurred just before a collision is of little or no value.

Among other things, the plaintiff claims that, even admitting that both cars reached the intersection of the streets at approximately the same time, his servant had the right-of-way; and to support this contention he introduced certain paragraphs of an ordinance approved by the mayor November 13, 1912, being Section 1341 of the Revised Ordinances of the city of Cleveland. These paragraphs read as follows:

"12. Vehicles going on main thoroughfares shall have the right-of-way over others going on intersecting streets.

"13. Vehicles going on main thoroughfares running in a general east and west direction shall have the right-of-way over those going on intersecting main thoroughfares.

"14. No vehicle shall cross any main thoroughfare or make any turn thereon at a greater speed than one-half the legal speed limit upon such thoroughfares."

These paragraphs provide new novel features in traffic regulations. They are not found in Babbitt's Summary of Rules, which embody all the generally prescribed rules for traffic regulation adopted by municipalities at the time his work, "The Law Applied to Motor Vehicles," was issued late in 1910. As changing or modifying the law of the road, so far as we know, the rules in question have never been construed. From the construction placed upon them by the plaintiff's servant in this case, as well as from common observation in their observance and operation in this city, we are of the opinion they are of doubtful wisdom and expediency. If, when the drivers of two motor vehicles reach the intersection of two streets at practically the same time, the driver having the right-of-way insists upon crossing first, under all circumstances and irrespective of existing conditions and of the right of others to pass over the street intersection, a rule giving the right-of-way is a menace rather than a blessing. The tendency seems to be that the party having the right-of-way believes, or affects to believe, that the other party, even if he reaches the crossing first, has no rights which

the right-of-way- man is bound to respect, and he, as a general rule, either wholly ignores them or superciliously grins at him as he dashes across the intersection. Reprehensible conduct of this kind should be checked, and every man made to understand that he must respect the rights of his fellow men. The old Latin maxim, "*Sic Utere*," etc., which says to each and all, enjoy your own rights as you please, but take care not to molest others in the lawful exercise of their rights, seems to have fallen into "*innocuous desuetude*." If the driver of an automobile would bear constantly in mind that he ought to be a gentleman, and that his rights end where the rights of his neighbor begin, there would be comparatively few automobile accidents and injuries on the public streets. As Benjamin Franklin once said, we lose more from lack of care than we do from lack of knowledge.

The law applied to motor vehicles has been often defined in the recent adjudications of courts, and is nothing more than the application of common law principles to a more highly specialized and vastly more dangerous instrumentality than slow-moving vehicles. An automobile, especially the touring car variety, is much more dangerous on a street than an electric street car, and should be operated with a greater degree of care (*Kreutzer v. Weil*, 134 Ky., 563). The space within which a street car is operated is limited to the rails on which it travels. The operation of an automobile is often limited only by the brick or stone walls of the buildings abutting on the street. You know the line of direction in which a street car moves, and can govern yourself accordingly; but no man living knows the line of direction of an automobile under control of an incompetent and reckless driver.

In *Railroad Company v. Keary*, 3 O. S., Judge Ranney, in his opinion at page 209, said:

"No one has the right to put in operation forces calculated to endanger life and property without placing them under the control of a competent and ever-active superintending intelligence."

This *dictum* applies with peculiar force to an automobile going at high rate of speed. Surely such a vehicle going fifteen

1914.]

Joseph v. Larkworthy.

miles an hour through a much traveled street in the built up portions of a city is manifestly a dangerous force; and it may be said to be such dangerous force, even if the thoroughfare through which it is running does not run through a congested portion of the city. An automobile going at a reasonable rate of speed, under proper control and under normal conditions, is easily managed; but when driven by reckless or incompetent persons, at a high rate of speed, under abnormal conditions, such as a wet, greasy, uneven roadway, it may *volte face* as quickly as a trained soldier, describe concentric circles, or the snaky, uncanny movements of an incandescent wire, or a rod which the roller or catcher in a rolling mill misses as it comes through the rolls.

It was said in *Steffen v. McNaughton*, 142 Wis., 49, and in *Fielder v. Davidson*, 77 S. E., 618, that an automobile was not so dangerous as to be put in the same class with locomotives, ferocious animals or dynamite; but we are inclined to believe that the judges who wrote these opinions never saw it under these conditions or in one of these moods. However, the apparent necessity for differentiating it from this dangerous classification would seem to indicate that the power for mischief which it may develop in certain contingencies is generally appreciated.

The right which the statute gives (Section 12604, General Code), to run fifteen miles an hour in municipalities or on streets other than in congested districts, is too frequently interpreted to mean that this rate of speed may be maintained under all circumstances. This is not the law. The statute is construed to mean that fifteen miles an hour is the highest limit of speed that may be maintained in such districts under ordinary circumstances or conditions or in any event. This section of the statute must be construed with Section 12603, General Code, which forbids the operation of "a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard to the width, traffic, use and the general or usual rules of such road or highway, or so as to endanger the property, life or limb of any person." And this statute is simply a statement or affirmation of the common law doctrine. In a munici-

pality in districts where a speed of fifteen miles an hour is permitted, it would be negligent to run five miles an hour if such speed, in a particular instance, would endanger the property or life or limb of any person. Indeed, if the driver of an automobile sees children two or three years of age toddling across the highway in front of him, the law requires him to come to a dead stop if necessary to avoid injuring them. The automobile in the hands or under the control of a competent, careful man of gentlemanly instincts is one of the greatest boons the genius of man has bestowed upon the race, but in the hands or under the control of the reckless or the incompetent, or the man of hoggish propensities, or a man afflicted with speed mania, whose greatest pleasure in his race with death is to clip a second from the time record, is a positive menace, worse than any plague that ever afflicted the denizens of a city. A man who is afflicted with an insane, feverish, hysterical desire to outrun "the horses of the Sun," and who leads one to believe that he is under the impression that he has but a few moments to live and is anxious to reach home so that he will not be found like Nicanor, "dead in his harness," is entitled to scant consideration. Automobile accidents are generally due to cheap, incompetent drivers, heedless boys, the reckless speeder, the supremely selfish man, the show-off gallant who splits the air, cuts corners and skates on the thin edge of eternity. When such men meet the fate of Darius Green or Icarus, they ought not to be heard to complain, but should be left in the Icarian Sea of disaster into which they fall solely by reason of their own conduct.

The cardinal rule of operation under all circumstances may be gathered from an inspection of Section 12603, General Code, above quoted. It is more clearly stated in the Massachusetts statute, which provides that "every person operating a motor vehicle shall run at a rate of speed at no time greater than is reasonable and proper, having regard to traffic and the use of the way and the safety of the public." The strict observance of this rule, and nothing short of it, will prevent collisions at street intersections in cities, and prevent accidents on streets generally. Ringing a bell or blowing a cacophonous horn is not sufficient

1914.]

Joseph v. Larkworthy.

when approaching street intersections in a city where the automobile is going fifteen miles or more an hour, if the circumstances demand a lower rate of speed. *Thies v. Thomas*, 77 N. Y. Supp., 276.

The law seems to be well settled that in the absence of a statute or ordinance regulating the manner in which persons should drive when they meet at the intersection of two streets, the rule of the common law applies, and each person must use ordinary or reasonable care to avoid injury to the other; and this reasonable care must be adapted to the place, the circumstances and surrounding conditions. *Schoening v. Young*, 104 Pacific, 132; *Jackson v. Shaw*, 204 Mass., 165.

"The law of the road does not regulate the manner in which persons shall drive when they meet at the junction of two streets." *Norris v. Saxton*, 158 Mass., 46, at 48.

In *Jackson v. Shaw*, *supra*, it was held, that at crossings each person must use due care and is bound to see that he does not interfere with others in the proper exercise of their rights in passing. This is a late case, 1910, and seems to indicate that a person coming to the intersection of two streets, say, going east and west, seeing a person approaching from the north or south, but so far distant that he may safely cross, has a right to do so; and he has a right to presume that the person going north or south is observing the law as to speed and is not traveling in excess of the speed limit, unless he can determine from visual observation that such person is exceeding the speed limit. The person going north or south seeing and knowing that the person going east of west is nearer the intersection than he is, must not interfere with him in the exercise of his right of passage across the street east or west, as he has the right-of-way.

Is the ordinance of the city of Cleveland respecting the right-of-way at street intersections anything more than declarative of this principle? We think not, except that if both reach the intersection at practically the same moment, the person having the right-of-way may pass or cross first. In the absence of the ordinance, the right of each to cross is equal; but because of

the ordinance the person who has not the right-of-way waives his right in the interest of the general welfare; but this ordinance does not give the person having the right-of-way the right to attempt to cross ahead of a person who reaches the junction of the streets a sufficient length of time before him to enable that person to safely cross, both traveling not in excess of the speed limit. Under such circumstances, the person having the right-of-way must not increase his speed and attempt to cross ahead of the other; and if he does and a collision results, he will not be heard to say that his conduct is excusable on the ground of "right-of-way."

To hold that a person traveling east or west, because he has the right-of-way, may catapult across the street intersection regardless of consequences and in utter disregard of the right of the north and south driver, would be absurd and idiotic. If a person driving north or south must, when he reaches the intersection, under all circumstances, stop because a driver going east or west is within thirty or forty feet of that crossing, it would be difficult to say when he could venture across; for if he waited for the first east and west driver to pass, another might at this moment be within a few feet of the intersection coming from the opposite direction; or if another or several are following close in the wake of the first, must he wait until all of them are across before he may venture over? There are main thoroughfares in this city on which, during the rush hours, automobiles are constantly passing east and west within a few feet of each other. Must a north and south driver wait until the stream of traffic subsides before he attempts to cross?

In *Cincinnati Street Ry. Co. v. Snell*, 54 O. S., 197, at 208, in the opinion, Spear, Judge, says:

"In a crowded thoroughfare, to look up and down and wait until all possibility of collision is past, would be like sitting on the bank until the stream should run by, and there would be but few hours in the busy part of the day when it could be practicable to cross."

This language is just as applicable to automobile traffic as to pedestrians and street car traffic.

1914.]

Joseph v. Larkworthy.

In a very recent case, *Traction Company v. Brandon, Admr.*, 87 O. S., 187, the same justice wrote the opinion. A street car struck a wagon at a street intersection, and the contention of the defendant was, that because the street car could not leave its tracks, the driver of the wagon, even if he reached the crossing slightly in advance of the car, should permit the street car to pass first; that under the circumstances the same degree of vigilance was not to be imposed upon the motorman as that required of the driver of the wagon. The court, at page 103 of the opinion, says:

“A duty to be on the lookout to avoid danger is just as fully imposed on the motorman operating a car as upon the driver of any other vehicle, and the street car company must operate its cars with reference to the rights of others traveling on the street.”

In the third part of the syllabus it is held, that in a much frequented part of the city, if a motorman discovers, or by the exercise of ordinary care could have discovered, the driver of a smaller vehicle about to cross the tracks in front of him, at a street crossing, it was his duty to use ordinary vigilance to stop or check the car in order to avoid collision; and even if the driver of a wagon omitted to look for the approach of the car, it will not, as a matter of law, defeat his right to recover if the motorman failed to use such diligence. See *Burvant v. Wolfe*, 126 Ia., 787.

Drivers of automobiles, even on country roads, are presumed to know that people are likely to be traveling on the road at all times, and must exercise vigilance accordingly. *Scott v. O'Leary*, 138 N. W., 512.

The plaintiff's servant will be presumed and held to know that East 79th street in the city of Cleveland is a much-used thoroughfare and is in constant use by automobiles moving at a rate at least equal to the speed limit. All chauffeurs in the city are presumed to know the traffic conditions on the various streets on which they drive and operate; and if Sherbondy, plaintiff's servant, as he approached the intersection of Quincy avenue

and East 79th street, was not keeping a sharp lookout and was driving at a rate of speed that prevented him from stopping or checking his car within a reasonable distance so as to avoid collision with the defendant, the plaintiff can not recover, even if the defendant was negligent in attempting to cross Quincy avenue in front of him. See *Wheeler v. Wall*, 137 S. W., 63.

In view of these well established principles, we hold that the ordinance, or the paragraphs thereof, of the city of Cleveland, giving drivers of automobiles going in a general east and west direction the right-of-way at street intersections over drivers of automobiles going in a general north and south direction, confers—

1. Only a preferential, and not an exclusive, right at the street intersections.

2. Where both parties reach the intersection at approximately the same time, the automobile going in a general east and west direction has a right to cross first.

3. When the driver of an automobile going in a general north and south direction reaches a street intersection of a main east and west thoroughfare, and sees an automobile approaching on the main east and west thoroughfare, but such distance from the crossing that he may safely pass over, he has a right to do so; and for this purpose he may presume that the driver of such automobile going in a general east and west direction is observing the law as to speed.

4. The driver of an automobile on such main east and west thoroughfare is required to keep a vigilant lookout as he approaches all street intersections, give due warning of his approach, and have his car under reasonable and proper control.

5. In cases where it is doubtful whether the preferential right to cross first exists in favor of the driver on the main east and west thoroughfare, the common law doctrine applies, and each must use and exercise due and ordinary care to avoid injury to the other.

6. By a "main thoroughfare," where it is not indicated, or defined by direction, is meant a thoroughfare having greater length and a larger volume of traffic than intersecting streets

1914.]

Joseph v. Larkworthy.

or highways. The volume of traffic on a street is necessarily affected by its length.

7. It is negligence *per se*, in a much frequented or built up portion of a city, to drive a vehicle that is so covered in or so constructed or loaded as to prevent the driver thereof from having a sufficient view of the traffic following or at the sides of such vehicle.

The last proposition is substantially Babbitt's 35th rule, which is taken from the New York rules, Section 1, Article XVII.

Automobile owners are by no means the worst offenders against this rule. The slow-moving covered-in van and the delivery wagon are familiar to all. In these covered-in vehicles, especially in automobiles, the driver's seat is usually three feet back from the front of the covered side; and unless there are windows on these sides toward the front, it is impossible for the driver to see what is transpiring on either side above thirty feet in front of him; and when some foolhardy driver dashes out of a side street when he is about thirty feet from the intersection, he can not see him, and consequently is not prepared for the emergency that may arise; and if a collision occur, it must be held that his own negligence in driving such a vehicle contributed to it.

Applying these principles to the case at bar, what do we find? Sherbondy, the plaintiff's servant, says that as he approached the intersection he was going or travelling from fifteen to sixteen miles an hour; that the defendant was going from twenty to twenty-five miles an hour; that as he got to the east line of the cross-walk on Quincy avenue he saw the defendant at that time about sixty feet southerly on East 79th street, traveling in the middle of the street, and that he himself was traveling on the side of the street, that is, on the north side; that the front of his car was about eight feet west of the east crossing on Quincy avenue when he saw the defendant, as he says, some sixty feet away. We have no doubt that the defendant was driving in the middle of the street, and contrary to law; and we are strongly inclined to think that the plaintiff's servant was also driving in the middle of the street. It is a matter of common observation that drivers of motor vehicles keep as near the center of the

street as circumstances will permit. In so doing they simply follow the impulse of natural law, that is, follow the line of least resistance, for experience has taught them that it is easier to steer or guide a car on the crown than it is on the slope of the street. All paved streets are rounded or crowned at the center and slope toward the curb or gutter. The two streets, that is, Quincy and East 79th, are practically the same width, about thirty-eight feet. If the plaintiff's servant was going fifteen miles an hour, he was traveling at the rate of twenty-two feet a second, and in two seconds he would be completely across East 79th street and some feet westerly of its west crossing, and he would be across before it was possible for the defendant to have reached the line in which he was traveling, even if the defendant was going thirty miles an hour. Indeed the defendant, to have collided with the plaintiff's car, under the circumstances, if Sherbondy's testimony is true, must have been going at the rate of sixty miles an hour. This we believe is not true; indeed it is unthinkable and unbelievable, under the circumstances. On the defendant's car, the top was up and the side curtains were on, and there is no evidence to show there were any windows on these side curtains that would enable Sherbondy to see what was transpiring on the sides immediately in front of him. In so driving a car, so covered in, he was negligent. But, in this connection, his state of mind or mental attitude must be taken into consideration, and a few questions and answers in relation thereto, found on page 18 of the record, will be illuminating:

"Q. In other words, you thought he could pass in behind you? A. It is not up to me to watch Mr. Larkworthy; I had the right-of-way.

"Q. You have the right-of-way; now why? A. Because on main thoroughfares the right-of-way is governed by that. Anything traveling east and west is given the right-of-way over things traveling north and south."

Here we find the real cause of this collision, or at least one of the causes. Sherbondy says it was not up to him to watch the defendant. The law says it was up to him to watch the defendant, to watch everything and everybody, not only in front of him,

1914.]

Joseph v. Larkworthy.

but on the sides of him and in the rear of him, so far as he could. Of course he was not required to keep a lookout in the rear to the exclusion of his duty to keep a vigilant lookout in front. He says he made no effort whatever to stop; and furthermore, that he could have stopped if he had desired to, within the length of his car, or seventeen feet. If he could, it was his duty to do so; and having failed to do so, he was negligent. Indeed his entire testimony shows an utter disregard of the rights of others, and the grossest kind of negligence.

Passing now to the testimony of the defendant, we find him saying with the utmost nonchalance that when he came to the intersection he looked eastward on Quincy avenue; that he approached Quincy avenue going about eight miles an hour; that he could see Quincy avenue far to the east; that he slowed down, as he approached the intersection, to four or five miles; that he saw a street car two blocks to the eastward on Quincy; that there was no other vehicle in sight, and that he could not tell which way the street car was moving. Inasmuch as we lose track of this street car in the testimony, it must be presumed that it was going eastward. Two blocks would be at least a thousand to fifteen hundred feet; and when he tells us that he did not see the plaintiff's car as he came to this crossing, in that space of a thousand to fifteen hundred feet eastward, he is stating something that is unbelievable and unthinkable, and the conclusion is irresistible that he did not look. If he had looked, he would have seen the car and would have seen it close to the crossing. He was guilty of the grossest kind of negligence in failing to look. When he did see the plaintiff's car, it must be said for him that he took all the usual and ordinary precautions that were then possible under the circumstances. He swerved sharply to the left, so that after the accident his car was facing due west. In so swerving to the left, the right side of his car collided with the left side of the plaintiff's car, thus causing the injuries complained of. There were three other persons in the defendant's car besides himself, and it is admitted that these persons were not injured in any respect, in fact the testimony shows that they were not disturbed or thrown out of their seats,

and this fact shows two things: first, that the defendant was not going at a rapid rate of speed; secondly, that he did not strike the plaintiff's car, as Sherbondy claims, about the middle thereof. The hubs on these cars were about three inches in diameter toward the inside; and the hub on defendant's right front wheel, which was introduced in evidence as an exhibit, shows clearly that the hub on the left front wheel of the plaintiff's car rode over it, and the plaintiff's car was raised suddenly and with a jerk over three inches, and this, together with the defendant's speed, caused it to be overturned. The fact, however, which escaped both court and counsel in the court below, is this: East 79th street, as well as Quincy avenue, is a main thoroughfare, and of this fact the municipal or city court should have taken judicial notice. Quincy avenue runs from Fairmount Reservoir to East 55th street, its entire length being two miles. East 79th street begins in that part of the extreme southern section of the city known as Union avenue, runs northerly to Linwood, where it enters, without change of direction, into Addison road and continues on to the lake, a distance of seven miles. From Union avenue to Linwood is about five miles. It is twice as long, in any event, as Quincy avenue, and has fully as large a volume of traffic. The ordinance introduced in evidence by the plaintiff provides, "No vehicle shall cross any main thoroughfare or make any turn thereon at a greater speed than one-half the legal speed limit." Sherbondy admits that he came up to and attempted to cross over East 79th street going fifteen or sixteen miles an hour, and going at a rate of speed absolutely prohibited by the ordinance.

The whole testimony conclusively shows—so clearly that the conclusion is irresistible—that both the plaintiff and the defendant were guilty of negligence, and that the collision was the result of their concurring acts of negligence.

The judgment of the municipal court will, therefore, be reversed, and this court, proceeding to render the judgment that should have been rendered by the municipal court, dismisses the petition or statement of claim of the plaintiff and the statement of defense and counter-claim of the defendant, and orders that each party pay one-half the costs.

1914.]

Zoz v. Lunkenheimer Co.

ALLEGATIONS UNDER THE WORKMEN'S COMPENSATION ACT.

Superior Court of Cincinnati.

JULIUS ZOZ V. LUNKENHEIMER COMPANY.

Decided, May, 1913.

Pleading—Allegations Under the Workmen's Compensation Act Which Are Good Against Motion to Strike Out—Section 1465-60.

In an action to subject an employer to the increased liability imposed by Section 1465-60, an allegation that the defendant employs five or more workmen in the same business and has failed to subscribe to the state insurance fund for injured employees, sets out facts showing that the defendant is subject to the provisions of the workmen's compensation act and will not be stricken out as irrelevant.

Nicholas Klein, for plaintiff.*Robertson & Buchwalter*, contra.

PUGH, J.

This case comes before the court on motion of the defendant to strike out certain specific parts of the petition on the ground that they are irrelevant to the cause of action therein stated.

1. The first item specified in the motion is as follows:

"Plaintiff further avers that the defendant employs five or more workmen regularly in the same business and about the same premises and that it does not pay into the state insurance fund of the State Liability Board of Awards, maintained by the state of Ohio."

This is an action wherein the plaintiff alleges that he was an employee of the defendant and that in the course of his employment he received certain personal injuries through the negligence of his employer. As the alleged injury was received June 26, 1912, the case comes under the workmen's compensation act.

It has already been decided by this court that the liability imposed by the act in question (General Code, Section 1465-60), on an employer who has not subscribed to the state insurance fund, consists in something more than a mere withdrawal of the right to make the common law defenses of contributory negli-

gence, assumption of risk and negligence of a fellow-servant, in that it also makes him liable for any wrongful act, neglect or default on his part. It was pointed out in that decision that the test of liability in this regard was not whether such employer exercised ordinary care or not, but that it was solely whether he was guilty of any wrongful act, neglect or default whatever. The statute creates a liability of employer to employee that was unknown to the common law and unknown in this state before the statute. Such liability, evidently, was not to be imposed on all employers, but only upon those who have failed to protect themselves by taking advantage of the preceding sections of the statute by subscribing to the state insurance fund. It is obvious that if it is intended in any particular instance to subject an employer to such new liability by an action at law for damages for personal injuries claimed to have been caused by wrongful act, neglect or default on his part, it is essential to set out in the petition the matters of fact which show that he is one of the classes of employers upon whom the statute imposes such new liability. The case is analogous to an action by a passenger against a common carrier, where in order to subject the defendant to the greater liability imposed by law on common carriers the facts showing that the defendant comes within the class of those who are subjected to such increased liability must be set out in the petition. *Schaefer v. Tool Co.*, 13 N.P.(N.S.), 553.

The defendant's motion to strike out the allegation above quoted is based upon the theory that Section 1465-60, General Code, increases the employer's liability in one respect only, namely, by withdrawing from him the right to set up the common law defenses above specified. In the judgment of this court this is an erroneous view of the statute.

2. The other parts of the petition which it is sought by this motion to strike out, namely, that the defendant was guilty of neglect and default in failing to provide a hood for the machine, and that it was the custom for other manufacturers in the trade to provide such a hood, are pertinent to the alleged neglect and default sought to be put in issue.

The motion will therefore be overruled.

1914.]

Police v. Commission.

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT.

Common Pleas Court of Cuyahoga County.

SAM POLICE V. THE INDUSTRIAL COMMISSION OF OHIO.

Decided, March 7, 1914.

Injured Employee—Dissatisfied with the Allowance Made to Him by the Industrial Commission—May be Without Remedy—No Appeal to the Courts in Such Case.

1. No right of appeal to the courts is given, under the workmen's compensation act, to an injured employee who is dissatisfied with the allowance which has been made to him by the industrial commission of Ohio.
2. Whether the industrial commission has authority to reopen a case which it has once determined—*Quære*.

C. W. Toland and G. E. Romano, for plaintiff.

G. A. Howells, Assistant Prosecuting Attorney, contra.

PHILLIPS, J.

I am in full accord with what counsel for plaintiff has said in regard to the purpose of this statute. It is intended for the benefit of the employees, by saving them from the expense of a lawsuit and the delays incident to litigation, and from a division of the amount recovered. As we all know is usual in these cases, personal injury cases, they are generally taken on a contingent fee, which results in a division of the amount recovered, and thereby to the detriment of the injured employee. It was to relieve the employee from that situation that this act was passed; and I think it was intended, also, for the benefit of the employer, and I think it is, when well administered, beneficial to the employer. It saves him from the trouble and expense of litigation; and it is beneficial to both employer and employee because it puts the whole matter in the hands of a tribunal selected in such way and with such experience, after the experience has been gained, as will enable that tribunal to make a more nearly uniform disposition of such cases than could be made by a trial to a court

and jury. We all have been surprised again and again at the large amount of recovery; and we have been surprised again and again at the small amount of recovery in such cases. They are not at all uniform; and that is remedied, very largely remedied, by the creation of this tribunal, selected as it is and devoting its whole time to these matters, and having the benefit of a large experience in these matters. And, then, it is an advantage to the public. It saves the courts a great deal of time; it saves the public the expense of long, tedious trials, and reviews, reversals and new trials. So it is a benefit all around—to the employer, to the employee, and to the public. That is the intention, and, when well administered, it will be the result.

I agree with counsel that courts ought to construe this statute and proceedings under it in such way as to carry out and accomplish these worthy purposes of the law, where that can be done. That is a general rule of construction, and I think its application is especially demanded in this kind of case. But when a court comes to exercise jurisdiction it must have jurisdiction. It won't do for a court to assume jurisdiction in order to remedy some wrong or to promote some good. That would never do.

The question of jurisdiction is a technical question; it must be so. There have been authorities cited to the effect that when a case has been appealed from a justice court to this court when there is no right of appeal, and the parties do not raise any question as to the jurisdiction of the court, but proceed to make up the issues in this court, and proceed to a trial of the case, then, if it be a matter of which the appellate court would have original jurisdiction, a case which could have come into this court originally, without any appeal, then this court has jurisdiction. There is no question but what this court would then have jurisdiction both of the subject-matter of the action and of the parties to the action. But that isn't this case.

“It is a fatal objection to the jurisdiction of any court, that it has not cognizance of the subject-matter of the action; that is, that the nature of the action is such as the court is, under no circumstances, competent to entertain. In such case, a plea to

1914.]

Police v. Commission.

the jurisdiction is not necessary. The cause may be dismissed on motion, or the court may, without plea, motion, or demurrer, dismiss it *sua sponte*; for the whole proceedings would be *coram non judice*, and void. * * * Want of jurisdiction may be taken advantage of by motion * * * as where the defendant questions the pretended service of process, or by demurrer if the ground appears from the complaint, or by answer, if the ground does not so appear. An inquiry as to the jurisdiction of the court may be made at any stage of the case; and when made, it must be considered and determined, for any further movement would be the exercise of jurisdiction. And if a court has not jurisdiction before an amendment, it has none to allow the amendment to be made."

Now, there is provision in this statute for appeal to this court, That is allowable in only one stage of the case before the board; that is when the board has denied the right of the plaintiff to participate at all in the insurance fund, and bases that denial on certain specific grounds. That is in harmony with the general purpose of this statute. The statute undertakes to avoid litigation; to save the parties and the public from delay, the annoyance, the expense and the uncertainties of litigation. Therefore, the right to appeal, the right to have litigation about it, is restricted to one single instance, and the action of the board is made final and complete, with no right to review or appeal in other instances. This is a part of the policy of the Legislature, and as much to be carried out and maintained as any of the other provisions of this scheme of compensation. The statute says that:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final."

There is never a right of appeal unless it is conferred by statute. There are many matters in which there is no appeal. Final jurisdiction must rest somewhere, and the Legislature may rest it in a tribunal, may rest it in any court; they may make the action of a justice of the peace final, with no right of appeal. In some matters the action of this court can not be appealed from, and now, in a great many matters, the judgment of the court of appeals can not be appealed from or reviewed. And

in this statute the Legislature has seen fit to make the action of this tribunal, this board, final with a single exception.

"In case the final action of such board denies the right of the claimant to participate at all in such fund"—that is not sufficient; that won't give him an appeal; but when that is denied "on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right," then the claimant may appeal.

Now, that is very closely and carefully restricted, this right of appeal. The court can not by construction enlarge the right of appeal. The language of the statute should be fairly construed and an appeal entertained only where the case comes fairly within the language of the statute when the language has been fairly interpreted and construed.

Now, it doesn't appear in this case that the board denied the right of the claimant to participate in the fund; it has allowed him to participate; and the adequacy or the inadequacy of the allowance is a question we can not consider in determining the question of jurisdiction. It does not appear either that the right to participate was denied upon any of the grounds stated in this statute which would make it appealable.

The criticism of this record of the proceedings of the board, I think, is hardly correct. The language of this finding of facts is not very carefully guarded. They find that the proof on file is such as to show that "the applicant's injury consisted of a hernia, not resulting from an injury." It says that this injury did not result from an injury, and they have erased the statement that "the applicant's injury was sustained in the course of employment." They could compensate for an injury only when it was suffered in the course of the employment. They say "that the proof on file is such as to show an aggravation of said hernia, for which an award is allowed, as above." I take it that that means that the hernia was not started, did not have its inception, in the course of the employment; that it was in existence; it was in the system; it was in the person in its incipency, before the aggravation of it by the work that he was

1914.]

Police v. Commission.

doing in his employment; that the disease existing at the time was aggravated and increased as a result of his employment, the work he was doing. That perhaps presented to the board a very doubtful question as to whether or not they could make an allowance as to whether or not he was entitled to one. Then, I have no doubt, that, by reason of mistake in the application, the board was misled—it appears that way to me—probably misled to the extent of this aggravation and the extent of the disability.

That doesn't authorize this court to entertain the case. They had made an allowance. In the view that the board probably had of this case, it was questionable whether any allowance should be made, and, if it should be made, the allowance should be inconsiderable. They were giving the applicant the benefit of the doubt as to whether there should have been an allowance, and they made the allowance very small. But they have not denied him participation in the fund on any of the grounds named here as grounds for appeal.

It may be that this plaintiff has had an injustice done him, without any intention to do him an injustice, of course, largely because of his mistake in making his application. That is his own fault; that is his own misfortune. But this court can't aid him, and it may be there is no means of remedy. There ought to be power in the board to reconsider a case. All courts reconsider a case after they have heard it and decided it, upon sufficient ground being shown; and I am inclined to think that this board would have the power to open up the hearing and to rehear it, without specific power being given by the terms of the act. I don't know about that, and I am not deciding that at all. But, if there is any remedy, it seems to me that is the remedy.

The petition will be dismissed for want of jurisdiction.

COMPENSATION OF COUNTY COMMISSIONERS.

Common Pleas Court of Adams County.

STATE OF OHIO, EX REL SHIVELY, PROSECUTING ATTORNEY,
v. G. B. LEWIS.

Decided, 1914.

*County Commissioners—Construction of Statute Fixing their Official
Year and Rate of Compensation.*

1. The phrase "for the year 1911" in Section 3001, General Code, as amended May 31, 1911 (Vol 102, O. L., 514), means the official year of the county commissioners beginning on the third Monday of September, 1910, and ending on the third Monday of September, 1911; and the phrase "for the year 1912" means the succeeding official year for said officers, or the first year of the term of those commissioners elected in 1910.
2. The clause "that the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911" is a proviso, and controls and over-rides the purview or general provisions of the act fixing the minimum compensation at nine hundred dollars with an additional compensation of three dollars on each full one hundred thousand dollars of the tax duplicate above five million dollars on December 20, 1911.
3. The compensation paid each county commissioner of Adams county, Ohio, for the year 1911 being seven hundred and fifty dollars, it follows that the compensation of each county commissioner beginning the term on the third Monday of September, 1911, and thereafter is but eight hundred and sixty-two dollars and fifty cents, and any amount drawn from the county treasury above that sum must be refunded.

F. A. Shively, Prosecuting Attorney, for plaintiff.
Stephenson & Mehaffey, contra.

CORN, J.

Heard on demurrer to the answer.

This is a friendly action brought for the purpose of determining the compensation of the county commissioners of Adams county for the term beginning the third Monday in September,

1914.]

State, ex rel, v. Lewis.

1911, and for subsequent terms, and necessarily involves the construction of Section 3001 of the General Code of Ohio as amended May 31, 1911 (102 O. L., 514).

The county commissioners claim that a proper construction of this section permitted them to receive the sum of \$1,131 per annum upon a tax duplicate of \$12,700,000 on December 20, 1911, and they, in fact, did draw that amount of money for each year of their term. The salary paid the county commissioners for the year 1911 as shown by the petition was \$750, and the claim of the prosecuting attorney is that a proper construction of said section authorizes a compensation of \$862.50 per annum and no more, and the commissioners having drawn \$1,131, they have overdrawn their salary to the extent of \$268.50 each year, and therefore each of them should return to the county treasury the sum of \$537. The question is raised by a demurrer to the answer.

The section before the amendment provided a minimum salary of \$750 per annum and an additional \$3 for each full \$100,000 in excess of \$5,000,000 on the tax duplicate of the county on the 20th day of December preceding the date of assuming the office. It was evidently the intention of the Legislature by the amendment to make the minimum salary \$900, but at the same time to prevent an increase over the former salary of more than fifteen per cent.

When the defendant Lewis came into office, September 18, 1911, the section as amended was the only statute in force fixing his compensation, the other having been repealed, and it is conceded that upon the amount of the tax duplicate of Adams county on December 20, 1911, he would be entitled to \$1,131 per annum, but for the limitation of one hundred and fifteen per cent. of the compensation paid "for the year 1911."

The amendment in question could not apply to the commissioners in office at the time of its enactment. Section 20, Article II, Ohio Constitution; *State, ex rel, v. Raine, Auditor*, 49 O. S., 580.

To ascertain the meaning of this act we must understand what the Legislature intended by the phrases "for the year 1911" and "for the year 1912." These can not mean the calendar years,

for commissioners are not paid an annual compensation based upon the calendar year; besides, in the calendar year of 1911 two commissioners served and under this law two different salaries are paid in monthly installments—one to the incumbent at the time of the passage of the act and another and different compensation paid to the commissioner assuming office on the third Monday in September, 1911. Therefore, if any meaning at all may be given this phrase it must be read "for the (official) year 1911." Such interpolation of words is permissible where the meaning of the Legislature is plain and unmistakable, and is necessary to carry out that meaning and make the statute sensible and effective. *Black on Interpretation of Laws*, 84.

I can not say that the meaning of the Legislature in this instance is plain and unmistakable, but to give it any meaning at all the word "official" must be supplied. The Attorney-General of Ohio reached the same conclusion in an opinion of the Board of Inspection and Supervision of Public Offices, dated August 10, 1911. Hence, we conclude the phrase "for the year 1911" means the official year of the county commissioners, beginning on the third Monday in September, 1910, and ending on the third Monday in September, 1911, and the phrase "for the year 1912" means the official year beginning on the third Monday in September, 1911, or the first year for the commissioners elected in 1910.

It is true that the actual salary is based upon the amount of the tax duplicate on December 20, 1911, although they begin their terms in September, and it may be said that such a construction makes it impossible to be performed, because the salary is payable in monthly installments, and for the first three months it is impossible to know the amounts to pay. This provision as to monthly payments is directory only, and even if mandatory the difficulty would be temporary and ought to yield in favor of the validity of a legislative enactment.

A more serious question, however, arises here. It appears that the Legislature intended to fix a minimum salary of \$900, but it also appears that the Legislature just as fully intended that there should not be an increase of more than fifteen per cent. over the salary of the preceding year. The salary paid in

1914.]

State, ex rel, v. Lewis.

Adams county for the year 1911 being \$750, it follows that the salary for the year 1912 and thereafter can not exceed \$862.50, if the one hundred and fifteen per cent. clause prevails. So far, therefore, as Adams county is concerned, and perhaps other counties in the state, one or the other of these clauses in the section must yield.

Immediately following the clause fixing the minimum compensation and the additional compensation for a tax duplicate over \$5,000,000 is this clause: "That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed one hundred and fifteen per cent. compensation paid to each county commissioner for the year 1911." This clause is the latest expression of the Legislature on the subject and is in the nature of a proviso which is defined by *Black on Interpretation of Laws*, 270, to be "a clause added to the statute or to a section or part thereof which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality or excludes some possible ground of misinterpretation of its extent." The same author on page 273 says the natural and appropriate office of a proviso to a statute or to a section thereof is to restrain or qualify the provisions immediately preceding it; and it is further stated on page 278 of the same authority: "But a proviso which is repugnant to the purview of the act will over-ride and control the latter."

I am aware that our Supreme Court have said that the rule, that a repugnant proviso nullifies the body of the act, is a rule of necessity and last resort, and that to apply it in any case is to stultify the Legislature, yet it is impossible to give force and effect in Adams county, at least, to both clauses of this act, one providing a minimum compensation of \$900 and the other limiting the compensation to one hundred and fifteen per cent. of that paid for the year 1911.

It follows, therefore, that the proper annual compensation for the county commissioners of Adams county beginning with the term of the defendant Lewis is \$862.50, and that the demurrer to the answer is well taken and must be sustained; and it is

judgment of the court that the plaintiff recover from the defendant the sum of \$537 and costs of this action. The same entry may be made in the cases of the other two commissioners.

**FAILURE OF SERVICE BECAUSE DEFENDANT WAS LIVING
UNDER AN ASSUMED NAME.**

Common Pleas Court of Franklin County.

GUY W. PECK v. TISNELDA H. PECK.

Decided, March, 1914.

Judgments—Modification Asked in Divorce Proceeding where Service Was Had by Publication—Failure of Notice Held Due to Fault of the Defendant—Motion to Reopen the Decree Denied—Section 11632.

A decree of divorce will not be reopened for the purpose of awarding alimony to the defendant wife, on the ground that there was no service except by publication and she had no knowledge of the pendency of the suit until after the decree had been entered, where it appears that her failure to receive notice and a copy of the petition through the mail was that she was living under an assumed name and was not known under her right name at her place of residence to which the petition and notice were correctly addressed.

James A. Allen, for plaintiff.

Arnold & Game, contra.

EVANS, J.

This is a motion submitted on behalf of the defendant to open up a judgment rendered against defendant in this court on March 4, 1910, and to let defendant in to answer, for the reason, as alleged, that said judgment was rendered without other service than by publication in a newspaper, and that during the pendency of the action the defendant had no actual notice thereof in time to appear and make her defense.

The motion is predicated on Section 11632, General Code, which provides that:

1914.]

Peck v. Peck.

"A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, within five years after the date of the judgment or order, may have it opened and let in to defend.

"Before the judgment or order can be opened, the applicant shall give notice to the adverse party of his intention to make application, file a full answer to the petition, pay all costs, if the court requires them to be paid, and make it appear, to the satisfaction of the court, that during the pendency of the action he had no actual notice thereof in time to appear and make his defense."

The answer and affidavits on behalf of the parties are filed and submitted, and also the original papers in the case.

The applicant is not seeking to open up the decree for divorce which was granted to plaintiff at the date above stated, but is seeking to set aside the judgment pertaining to alimony, and to open up said judgment in order that she may apply for alimony.

Inasmuch as the parties and counsel are familiar with all the facts and evidence presented it is not necessary to recite in detail the facts of the case. I have examined and weighed all the evidence presented; also the authorities, with a great deal of interest. The question presented is one that rarely arises in our practice and procedure, and while there are some cases in this state under the statute above quoted, yet I find none presenting the question under the facts and circumstances we have here.

Bay v. Bay et al, 85 O. S., 417, is a case that comes more nearly in point than any other case cited, yet it differs in some material respects.

Bay v. Bay (supra) was a proceeding under the same statutes that concerns us in this case.

In 1895 Bay filed his action against defendant, Anna C. Bay, in this state, for divorce on the ground of wilful absence, praying for divorce and other relief. Plaintiff filed an affidavit for publication of notice, alleging therein that the residence and post-office of said defendant is Walkerville, Oceana county, Michigan, and for that reason service of summons and a copy of the petition can not be made in this state. There was no service except by publication.

The case was heard, the court granted the divorce, and further ordered, "that by reason of the acts of aggression of the defendant, Anna C. Bay, etc., that she is excluded and forever barred from claiming or holding any estate or interest, either vested, inchoate, dower, or inheritance, or otherwise, in the real estate or personal property of plaintiff." Bay died November 5, 1910, and on December 24, 1910, defendant, Anna Bay, made application to set aside the decree and judgment, and for leave to answer. In her answer, among other things, she alleges that she had no notice or knowledge of the pendency of said petition for divorce until after the death of said Bay, and on December 24, 1910, the defendant filed her application to set aside the decree and judgment.

It is important to note that in the Bay case the records show that the only service on defendant was a constructive notice by publication; that the affidavit for publication, sworn to by plaintiff, gives the place of residence and post-office address, and gives it correctly; that plaintiff did not do what his duty required, that is, to deposit forthwith in the post-office, directed to defendant, a summons and copy of the petition.

This being the case, she, on her allegation that she had neither notice or knowledge of the pendency of the petition until after plaintiff's death, the court held that she has a right to be heard upon all questions arising upon this alleged fraudulent judgment as to her rights in the property of plaintiff.

In other words, the court based its holding on the fraudulent acts of the plaintiff in obtaining said decree and judgment, and the court states the law of the case in the syllabus, as follows:

"Where a husband, by fraud and false testimony, obtains a decree of divorce for the wife's aggression, and the decree also, by reason of the wife's aggression, so found, bars her of alimony, dower and all other interest in the husband's property, the decree dissolving the marriage relation is conclusive; but when the court making such decree did not have jurisdiction of the wife's person, she may thereafter have said decree and the issues opened up so far as they relate to her interests in the husband's property and be let in to defend."

In the case at bar, plaintiff, Peck, made an affidavit that service can not be made within this state on defendant; that she is a

1914.]

Peck v. Peck.

resident of the city of Washington, District of Columbia, and resides at Number 1223 Twelfth street, N. W., Washington, D. C.; that on this affidavit, the court ordered service to be made by publication, as provided by law in such cases, and that forthwith on the filing of the petition a copy of the petition be mailed to the defendant at her place of residence. On December 3, 1909, a precipe was filed by plaintiff with the clerk of this court, directing said clerk to issue summons with a copy of petition and to mail same to defendant at 1223 Twelfth street, N. W., Washington, D. C.

The affidavit of the deputy clerk avers that on December 3, 1909, as such deputy, he mailed a summons and copy of the petition in said case to the defendant, Tisnelda Hildegard Peck, at No. 1223 Twelfth street, N. W., Washington, D. C.; that thereafter, on or about December 18, 1909, said summons and copy of petition which were mailed to defendant were returned to the clerk of the court here by the post-office department as unclaimed.

The envelope containing the summons and the copy of petition so mailed, and addressed above, is attached to said affidavit. A return of proof of publication is made on January 23, 1910.

Section 11984, General Code, provides:

"If the defendant is not a resident of this state or his residence is unknown, notice of the pendency of the action must be given by publication as in other cases. Unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to plaintiff, and could not with reasonable diligence be ascertained, a summons and copy of the petition, forthwith on the filing of it, should be desposited in the post-office, directed to the defendant at his place of residence."

The returned envelope, referred to in said affidavit, shows the postmark of Washington, D. C., that it was unclaimed, and was returned to writer, and endorsed on back "Not at 1223-12."

Defendant admits that at time said summons was returned she lived at No. 1223 Twelfth street, N. W., Washington, D. C., but was living there under the name of Hildegard T. Ruh, her maiden name. She was employed in one of the departments of the government at Washington. The reason assigned by her counsel for not going under her married name is "that it is

common knowledge that the government will not employ or retain in its employ any married women."

Defendant claims that plaintiff knew that she was living under another name. This plaintiff denies, and says that shortly before he began his action for divorce he went to Washington to see her, in order to get her as he says, to join him in executing a mortgage, and also to ascertain whether or not she would live with him. He says he went to No. 1223 12th street, N. W., an apartment house where she lived, and that he was admitted into the apartment house by defendant herself, who answered the ring of the bell, and that he had no occasion to inquire for defendant; that he did not then know, nor thereafter learn, by what name defendant was known to other persons residing in said house.

Defendant denies this, and claims that plaintiff came to her room door and was there admitted by her; that at the front entrance her name, Hildegard Ruh, was on the board and also the same name on the door of her room. Defendant says in her affidavit that under date of November 5, 1909, plaintiff wrote her from Columbus that he was leaving for New York, and would call on her at Washington about seven o'clock that evening.

On account of the fact that so much of material facts in the affidavits of these two parties are conflicting, facts averred by the one being denied by the other, it is difficult to get at the truth concerning a great many material matters.

It is clear, however, that defendant was not going under her real name at Washington, and while she claims that plaintiff knew that fact, which he denies, it appears that her reason for so doing is that the Government would not employ, or retain in its employment, married women.

It also appears that defendant did not go under her real name in her private life, or have her real name enrolled at the post-office so that she could get mail addressed in her real name. It also appears that at the time said summons and copy of the petition reached Washington, which was mailed to the correct number and street where she then lived, that she was living at said number and street, and that no person could there be found of the real name of defendant.

1914.]

Peck v. Peck.

I am of the opinion that even though plaintiff may have known she was going under another name for said purpose in the Government department, and may have addressed letters to her there in that name, which he denies, yet that would not excuse her for concealing her real name in private life, or at the post-office. Nor does it appear that plaintiff knew she was so doing. And he claims that defendant told him at the time he visited her in November, 1909, shortly before the petition was filed, that mail addressed to her in her real name would be received by her.

I am not convinced that it was any fault either of plaintiff, or of the post-office officials at Washington, that defendant did not receive the summons and copy of the petition so mailed. And I am not able to find that plaintiff was guilty of any fraud in said divorce proceedings, or in his acts or conduct in endeavoring to obtain service on defendant.

The court in *Bay v. Bay* predicated its decision giving defendant leave to open up said judgment and to answer upon fraud perpetrated by plaintiff in that case. For the facts there shown that plaintiff did perpetrate a fraud and violated an express provision of statute, by not mailing, or having the clerk mail, to defendant, a summons and copy of the petition, although he swore in his affidavit where the place of residence of defendant was. This was fraud on his part because it showed intent on his part to conceal from her the pendency of said action.

But that is not the case here, for the evidence shows that plaintiff in this case complied with the requirements of the statute in all respects therein provided in regard to service.

If defendant had shown that she did not receive a summons and copy of the petition, so mailed, by reason of the fault either of plaintiff or of the post-office officials, then her want of knowledge or notice of the pendency of said action would afford good grounds to open up the judgment, and let her in to answer.

Nelson on Divorce and Separation, Section 822, says:

“Where it is shown that a copy of the summons was mailed to defendant, properly addressed, the defendant may show that she has received her mail at such address with uniform regularity for several years, and that no copy of the summons in the

case ever reached her, and such proof will create the presumption that the postage on the letter containing the summons was not paid and that the letter was not mailed."

But defendant has made no such showing here. On the other hand, the proof shows that she put it beyond the power of the post-office officials to deliver mail to her, addressed in her real name, by going under a name other than her real name.

I am of the opinion that the defendant has not made a showing here such as will entitle her to have this judgment opened up to let her in to answer. She is seeking to come into a court of equity to have a decree and judgment of the court opened up, and let in to answer, where the proof shows no fraud on the part of plaintiff in the proceedings, but, on the other hand, does show, that by her own fault in concealing her real name, and using another name, without right so to do on her part, and so doing for the purpose of misleading the Government, and evading a rule of the department of Government, is the cause of her not receiving said mail. She has not shown sufficient grounds, and besides is not in a position in this case to be afforded the equitable relief asked.

The motion is overruled. Exceptions.

1914.]

Estate of Todarello.

**ADMINISTRATION OF ESTATE OF A DECEASED SUBJECT
OF ITALY.**

Probate Court of Mahoning County.

IN RE ESTATE OF FRANCESCO TODARELLO, DECEASED.

Decided, December 23, 1913.

Estates of Decedents—Swedish Treaty Requires Notice to Italian Consul of Death of Italian Subject, When—Right of Consul to Appointment as Administrator Exists, When—Opinion of U. S. Supreme Court Construed.

A consular agent of the Kingdom of Italy has neither an exclusive nor a naked right, under treaty stipulations or within the class designated in Section 10617, General Code, to appointment as administrator of the estate of an Italian subject dying intestate in this state, where one of the next of kin is a resident of the state; nor is he entitled to notice of the death of a subject of the King of Italy, unless there are no known heirs in this country and he is himself a resident of the county in which the appointment is to be made or has a representative in such county who has been duly certified to the court.

DAVIS, J.

Heard on motion to revoke letters of administration and remove administrator.

Francesco Todarello, deceased, at the time of his death was a subject of Italy, residing at Lowellville, Mahoning county, Ohio, and left surviving him as his only heirs at law and next of kin Guiseppe Todarello, a brother, residing at Lowellville, O.; also Mary Todarello, Committa Todarello, Carmela Todarello, as sisters, and Vincenzo Marabetti, half-brother, all of whom are subjects and residents of Italy.

Guiseppe Todarello, brother of decedent living in this country and within the jurisdiction of this court, made application for and qualified as administrator of the estate herein on or about the 12th day of September, 1913.

On or about October 13, 1913, Biagio Sancetta filed his motion herein alleging that Nicola Cerri is the duly appointed and

qualified consular agent of the Kingdom of Italy in and for Northern Ohio, including Mahoning county; that the said Nicola Cerri is temporarily absent from the United States and that during said absence, he, the said Biagio Sancetta, is the duly appointed, qualified and acting consular agent of Northern Ohio including Mahoning county, and prays for the removal of the administrator herein and that as acting consul, he be appointed instead of said administrator, and complains as follows:

“*First.* That as such acting consular agent by virtue of the treaty of 1911 between Sweden and the United States, which he has a right to invoke under the most favored nation clause of the treaty of 1878 between the Kingdom of Italy and the United States, he has the paramount and exclusive right to administer the estate herein.

“*Second.* That by virtue of the treaty of 1878 between Italy and the United States, he was entitled to notice from this court before the legal appointment of an administrator could have been made herein; that no notice was given.”

In support of the motion as to the alleged exclusive right of the Italian consul to administer the estate herein, there has been cited as construing that right in said treaty of Sweden the case of *Rocco v. Thompson*, decided by Judge Day of the Supreme Court of the United States; and the decisions of other inferior courts that have based their opinions on an erroneous construction of Judge Day's obiter dictum, in that case, as to rights of consuls under the treaty of 1911 between Sweden and the United States.

In the case of *Rocco v. Thompson*, Rocco, an Italian consul within and for certain portions of the state of California, taking advantage of the Argentine treaty of 1853, by virtue of the most favored nation clause of the treaty of 1878 between the Kingdom of Italy and the United States claimed the right as against Thompson, public administrator of California, to administer the estate of Giuseppe Ghio, an Italian subject dying intestate in the state of California. Judge Day, in holding against the contention of the consul and in favor of the appointment of the public administrator, says:

1914.]

Estate of Todarello.

"It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.

"For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in Article 33, as follows:

"Until the conclusion of a consular convention which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls or vice-consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district."

Following the above quotation, from the Peru treaty, by Judge Day, in his opinion in the *Rocco v. Thompson* case, to illustrate exclusive power given to a consul by treaty, in contract with the language of the Argentine treaty which simply gives as he holds the right to intervene by taking possession of and preserving property of his subjects, before the appointment of an administrator, and also to intervene after an administrator has been appointed if administration was not being properly conducted for the purpose of further protecting the estate of the deceased subject of his country, he quotes the second paragraph of Article XIV of the treaty between Sweden and the United States, which language is as follows:

"In the event of any citizens of either of the contracting parties dying without will or testament, in the territory of the other contracting parties the consul-general, consul, vice consul-general of the nation to which the deceased may belong, or in his absence, the representative of such consul-general, consul, vice consul-general or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been

granted, take charge of the property left by the deceased, for the benefit of his lawful heirs and creditors, and moreover, have the right to be appointed as administrator of such estate."

But before quoting from the Sweden treaty and after quoting from the Peru treaty, he uses the following language: "and in the convention between the United States and Sweden proclaimed March 20th, 1911, it is provided."

Judge Day does not state here in his introduction to the quotation from the Sweden treaty that there is an exclusive right as he does in his introduction to the quotation from the Peru treaty by using the words "as where that was the purpose." The antecedent of the words "as where that was the purpose" being "had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms." If Judge Day had so intended that there was an exclusive right in the consul to administer by virtue of the language in the Sweden treaty, he would have so stated before quoting it as he did before quoting the clause from the Peru treaty; or would have immediately followed the clause quoted from the Peru treaty with the clause quoted from the Sweden treaty and made his first introduction to said quotations plural. Judge Day, in my opinion, in quoting from the Peru and from the Sweden treaty attempted to illustrate what he had stated in the prior part of his opinion, that treaties are drawn by persons competent to express their meaning and that nothing should be added to or taken away from the language of said treaties. That is, he aimed to point out (1) that in the Argentine treaty there was, by virtue, of the language of said treaty absolutely no right whatever in the consul under said treaty to administer estates but simply to intervene and protect estates. (2) That in the Peru treaty there was an exclusive right given to administer in the absence of legal heirs. (3) That in the Sweden treaty there was a naked right given to administer, but not an exclusive right, so that there is a distant and absolutely different right

1914.]

Estate of Todarello.

given to consuls in each treaty. In other words, the Argentine treaty gives simply the right to intervene, both before and after the appointment of an administrator; in the Sweden treaty not only the right to intervene but also the right to administer, but not an exclusive right to administer, for if so it would have stated as in the Peru treaty. In the Peru treaty, there is given not only the right to intervene as in the Argentine treaty, and not only the additional naked right to administer as in the Sweden treaty but also the paramount exclusive right to administer the estate of subjects of the consul's country, dying intestate in this country, with no known heirs here.

Keeping in mind the fact that treaties entered into between the United States and any foreign country are superior to the laws of the United States or of the several states where there is any conflict, and also that the consul of any foreign country, by virtue of a most favored nation clause, in the treaty of his country with the United States, has the power to invoke the rights of any other treaty entered into by the United States with any other foreign country, I am of the opinion that there is no right in either the Italian or Sweden treaty which revokes any of the statutory rights conferred by Section 10617, General Code of Ohio. Also that the Italian treaty of 1878 does not enlarge by constituting the consul a person in either of the four classes of said Section 10617 of the General Code of Ohio entitling him to the right of appointment as administrator.

Now as to whether or not the Sweden treaty enlarges the powers of said Section of our General Code in behalf of the consul, let us suppose that under said treaty the consul had in any or all of the four different classes of said Section 10617 of our Code a right to be appointed, it could not be considered by any court, in my opinion, as an exclusive right, but simply as a naked right with others in the same class, thus placing with the court the right to consider the consul in selecting from each class in order of priority—for the best interests of the estate. Even then, it would be optional with the court in this case as to whether he would appoint the brother of decedent or the consul of Italy.

As a final conclusion on this point, I am of the opinion that the Sweden treaty enlarges on the said section of the General Code of Ohio only as to the fourth class, by placing the consul on a par with all other persons included in said class of said Section 10617, as entitled to appointment, or in other words, entitling him to protection against discrimination because he is a foreigner. Under no circumstances is there an enlargement of rights as to persons entitled under the first or second class of said section of our General Code, for neither treaty entitles the consul to notice of the death of the deceased subject of his country, dying intestate in this country, unless there be no known heirs of the deceased in this country. If he were given the right to administer where there are known heirs, in this country, he most certainly would be given the right of notice. See *In re Savario Costanzo Estate* 15 N.P.(N.S.), 225, and *In re Celeste Andreano Estate*, by Judge Alexander Haddon, Probate Judge of Cuyahoga County, Ohio. *In re Carmelo Gurrieri's Estate*, by Judge William J. Martin of Essex county, N. J. Also *In re Lis Estate*, Supreme Court of Minnesota in 139 N. W. Reporter, 300.

AS TO THE QUESTION OF NOTICE.

1. Article XVI of the Italian treaty requires notice only in case of no known heirs of the deceased; Article 14 of the Sweden treaty requires notice only in case of no known heirs of deceased in this country.

Deceased had a brother, a next of kin heir, appointed administrator herein, residing within this county. The consul therefore can not claim notice under either treaty.

2. The court has held that the consul has neither an exclusive nor a naked right to appointment as administrator within the class of Section 10617 of the General Code of Ohio where decedent's brother stands and, therefore, said consul is not entitled to notice by virtue of the laws of Ohio.

3. Let us suppose either or both: (1) that there was no known heir in this country; (2) that said consul came within

1914.]

Schaine v. Schaeffer.

the class of said section of our General Code entitling him to notice, yet to get the benefit of that right whether given by local law or treaty, he must bring himself within the jurisdiction and operation of the procedure of the court by being a resident of the county or by having a representative in the county certified to the court as such, so that the court's arm can reach him with its citation or notice. Treaties define rights and before consuls can demand those rights, they must comply with the laws of procedure of the different jurisdictions.

The consul, in this case, is a resident of Cuyahoga county, and having no representative in Mahoning county, would not be entitled to notice even under the above presumed facts. See *In re George Stingacs*, 12 N.P.(N.S.), 107.

The motion to remove the present administrator and revoke his letters of administration is hereby overruled, and entry of decree is ordered accordingly.

**THE PRESENT BULK SALES LAW A VALID
ENACTMENT.**

Common Pleas Court of Montgomery County.

MEYER SCHAINED V. W. H. SCHAEFFER ET AL.

Decided, May 15, 1914.

*Constitutional Law—Ohio Act Less Drastic Than Those of Other States
—Its Provisions Not Unreasonable.*

The "bulk sales" law, contained in Sections 11102 and 11103, General Code of Ohio, as amended in 103 Ohio laws, p. 461, relating to the transfer of a stock of merchandise and fixtures other than in the usual course of trade, is a valid exercise of the police power of the state, and a law of this character is reasonable and is not unconstitutional.

Wolfe & Wolfe, for plaintiff.

Howard B. Cromer and *A. W. Schulman*, contra.

MARTIN, J.

The facts in this case are as follows: Nathan Falk and Joseph Falk were partners in the restaurant business under the name of the Berkshire Dairy Lunch. On February 11, 1914, Falk Bros. sold their entire stock of merchandise and fixtures pertaining to the restaurant business to Meyer Schaine. At the time of the sale, Falk Bros. were indebted to W. H. Schaeffer upon an account for merchandise sold by him to the Falk Bros. Meyer Schaine, the purchaser, paid an adequate consideration for the property bought by him. The purchaser took immediate possession of the restaurant. The purchaser did not demand, and did not receive, a written list, under oath, of the creditors of Falk Bros., together with their addresses and the amount of indebtedness against Falk Bros. On the 20th day of February, 1914, W. H. Schaeffer entered suit against Falk Bros. in the municipal court of the city of Dayton, and judgment was rendered in his favor. Execution was issued and levy was made by the bailiff upon the identical stock of merchandise bought by Meyer Schaine from Falk Bros. The property was about to be sold, when Meyer Schaine obtained from this court a temporary injunction restraining the officers of the municipal court from proceeding further in the matter. The defendant here, plaintiff below, filed his answer setting forth the fact that the requirements of the "bulk sales" law, contained in Sections 11102 and 11103, General Code of Ohio, as amended in 103 Ohio Laws, p. 462, had not been followed. The defendant claimed that the sale to Meyer Schaine was void and that no title to the property ever passed to him. The case comes before the court upon the motion of the defendant to dissolve the temporary injunction.

The facts being undisputed, the issue in this case is the constitutionality of the "bulk sale" law. As known by all parties in this case, the Supreme Court of the state of Ohio has already declared two "bulk sales" laws unconstitutional. It is unnecessary for the court to go into detail in reference to those laws, only to say this, that the laws passed upon by the Supreme Court in the 70th Ohio State in the case of *Miller et al v. Crawford et al*,

1914.]

Schaine v. Schaeffer.

was a very unreasonable law. It contained six requirements, three of which had to be fulfilled by the seller and which might not have been fulfilled and the purchaser been none the wiser, and if any of those six requirements had not been complied with the sale would have been fraudulent or void as to creditors. In other words, the purchaser, who would have suffered, might have in good faith fulfilled all the provisions of this law which the law required the purchaser to carry out and still would have been liable to claims of the creditors as far as the goods were concerned. Then, there were some requirements which could not have been fulfilled by many of the sellers or venders if they had made that effort, such as the original invoices for the cost price of the merchandise, etc. So that the Supreme Court of the state had very good reasons to find that this law was repugnant to the first article of the Constitution of the state, because it placed an unwarrantable restriction upon the right of the individual to acquire and possess property, and because it contained a forbidden discrimination in favor of a limited class of creditors. It especially had good reason to find that the law unduly restricted the acquirement and possession of property.

When we come to the 84th Ohio State, in the case of *Williams & Thomas Company v. Preslow*, the Supreme Court passed upon the second "bulk sales" law, in which the court found that the same objections that applied to the first "bulk sales" law applied to the second law. But an examination of the second law will show that the provisions thereof were not so restrictive, neither were they so onerous as the first law referred to in the 70th Ohio State. The main objection to the second law was that it provided that, in case the purchaser did not place on record at the recorder's office a notice of the purchase which he was about to make seven days before said purchase, his failure to do so created a presumption that the sale or purchase was a fraud upon creditors. In other words, the law proposed to change the universal rule of evidence and testimony in regard to proof. Now, the court is not so sure that the Supreme Court of the state of Ohio is right upon this proposition, because a number of

states, including the United States Supreme Court, have found laws more drastic than this to be constitutional.

This brings us to the law under consideration, which is very different and much less drastic than the first laws which we have mentioned. As the parties to this action well know, it only requires that the purchaser shall demand and receive a list of creditors certified to by the seller under oath and that he must give five days notice by registered letter before the purchase is made complete to the creditors in the list furnished as well as creditors of which he has knowledge concerning the proposed sale.

Now, it is true that in extreme cases this may somewhat interfere with the possession and disposition of property, but those are extreme cases. Under this law, as the court understands it, if the seller gives a list to the purchaser and swears that it is a true list of his creditors, the purchaser, at least, is not disturbed in his possession of the goods if he carries out the requirements of the law in relation to purchaser. The seller, by reasonable diligence, should be able to name the list of his creditors. It does not appear to the court that this law is such class legislation, as far as the requirements go, as to render it unreasonably burdensome. As the court has already stated, practically every state in the Union has passed laws as drastic if not more drastic than this, and these have not been found unconstitutional except in three states, Ohio, New York and Utah.

But the court does not need to rest upon its own opinion in considering this law constitutional, because in the state of Michigan there has been been a law passed which is almost word for word similar to the law in this state, only that that law is more drastic as far as the purchaser is concerned than the law in Ohio, because in that state it makes all sales void unless the seller shall at least five days before the sale make a full detailed inventory showing the quantity and as far as possible with the exercise of reasonable diligence the cost price to the seller of each article to be included in the sale. In this respect the Ohio law is more liberal and less restrictive than the Michigan law.

1914.]

Schaine v. Schaeffer.

We find in 145 Michigan, in the case of *Spurr v. Travis*, p. 721, that this law has been declared constitutional by the Supreme Court of the state of Michigan; and we further find that this opinion has been confirmed by the Supreme Court of the United States in Vol. 217, p. 461, in the case of *Kidd, Dater & Price Co. v. Musselman Grocery Co.* And both courts found that such an act is a valid exercise of the police power and is not invalidated by reason of being restricted in its operation to merchants.

In the 70th Ohio State the court had occasion to quote Cooley on Constitutional Law as applying to the act then before the court. In the case of *Spurr v. Travis*, in 145 Michigan Reports, we find that the court also quoted Cooley on Constitutional Limitations, 7th Edition, p. 554, in which Cooley holds as follows:

“Laws public in their objects may unless express constitutional provisions forbid, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens or be confined to particular classes, as minors or married women, bankers or traders and the like. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character; and of their propriety and policy the Legislature must judge.”

It not only seems to the court that this law is constitutional, but it is a law which should be commended, because it is designed to prevent fraud and dishonesty. Only those who are ignorant of the law will suffer to any great extent from its operation.

The Connecticut “bulk sales” law was declared constitutional not only by the Supreme Court of Errors of the state of Connecticut, Vol. 76, p. 515, case of *Walp v. Moor*, but the opinion in this case was also affirmed in the 211 U. S. Reports, p. 489, in the case of *Lemieux v. Young, Trustee*. The Connecticut law is very similar to that of Michigan and Ohio with some differences, but the principles that apply to the laws of all three states are the same. The Supreme Court of the United States has passed

upon two of them and found them to be constitutional. The court feels that, when the Supreme Court of the state of Ohio passes upon this particular act, it will follow the opinion rendered by the Supreme Court of the United States.

This being the opinion of the court, the court therefore finds that the temporary restraining order in this case granted should be dissolved and that plaintiff's petition be dismissed and that the prayer thereof be refused.

**WHETHER UNABLE TO EARN A LIVELIHOOD A QUESTION
FOR THE JURY.**

Common Pleas Court of Hamilton County.

HERBERT E. HUGHES v. THE B. & O. S. W. RAILROAD CO. ET AL.

Decided, May 19, 1914.

*Benefits From a Railway Relief Department—Total Inability to Earn
a Livelihood Not Restricted to Plaintiff's Previous Occupation—
Question of Inability One for the Jury.*

In an action by an injured railway employee for aid from the relief department, under a rule applying to those "totally unable to labor" or "to earn a livelihood in any employment," the fact that he had lost his right hand in the service and had been without employment during the period for which benefits are asked, is sufficient for submission to the jury of the question whether he is able to earn a livelihood in any employment.

Harmon, Colston, Goldsmith & Hoadly, for the motion.

A. D. and R. S. Alcorn, contra.

MAY, J.

The plaintiff in this action was a switchman in the employ of the B. & O. Southwestern Railroad Company and a member of the relief department of the B. & O. Railroad Company. Under the regulations of this relief department which applied to all

1914.]

Hughes v. Railway.

employees of the B. & O. Southwestern Railroad Company, a switchman was in Class C, and there was deducted from his monthly salary a certain sum for the payment of dues to the relief department. Section 51 of the regulations provided that a person injured in the employ was entitled to certain benefits, and if the disablement "renders the member totally unable to labor, or, when of a permanent character, to earn a livelihood in any employment," he was entitled to \$1.50 for the first fifty-two weeks after the accidental injury received and seventy-five cents per week thereafter.

The plaintiff in this case, while in the employment of the company, and while a member in good standing of the relief department, was injured and the injury resulted in the amputation of his right hand. The injury occurred on the 2d day of October, and by the 24th day of February following the relief department claimed that the plaintiff was no longer entitled to benefits under this section.

At the trial plaintiff testified that he was unable to work, and testimony was also introduced to show that he was unable to secure any employment during the period for which benefits are claimed.

There was evidence introduced on behalf of the defendant in this case showing that men, injured in the same manner as the plaintiff was injured, were in the employ of the railroad company as extra switchmen, and there was also evidence that the plaintiff at the time of the trial had temporary employment in the city as a night watchman. However, during the time for which benefits are claimed the plaintiff had no employment at all.

A motion to direct a verdict for the defendant at the close of the plaintiff's case was overruled, and the same motion being renewed at the close of all testimony was likewise overruled.

The defendant contends that the court erred in not granting these motions and in submitting the question to the jury.

In support of this contention the defendant relies upon the cases of *B. & O. Employees' Rel. Assn. v. Post*, 122 Pa. St., 579; *Lyon v. Railway Passenger Assurance Co.*, 46 Iowa, 631; *Aetna Life Insurance Co. v. Lasseter*, 153 Ala., 630; *Rayburn v. Casual*

ty Co., 141 N. C., 425; *Albert v. Order of Chosen Friends*, 34 Fed., 721.

These cases are clearly distinguishable from the case at bar.

Albert v. Order of Chosen Friends, *ubi supra*, merely decides that the language "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood" does not refer to an occupation of the same kind, but refers to any occupation, and the answer setting up that the defendant was earning a livelihood in another occupation is a good defense.

And *B. & O. Employees' Rel. Assn. v. Post*, 122 Pa. St., 579, is to the same effect, to-wit, that a total inability to earn a livelihood in any employment is not restricted to the particular trade in which a member is engaged at the time of his injury.

The Alabama and North Carolina cases cited above are clearly distinguishable from the case at bar in that the injury in each case did not prevent the injured party from engaging in a productive occupation. In the Alabama case the insured was a law and stock agent for a railroad and carried on his business after the injury; and in the North Carolina case the section foreman who was injured testified that he performed the same services in the same occupation and at the same salary as before the injury complained of.

In the case at bar there is no testimony that during the time for which benefits are claimed the plaintiff was engaged in any employment. In leaving the case to the jury the court said:

"Under the law in this state to earn a livelihood means to be able to earn money sufficient to have a living in any employment, no matter what its character is that the party can obtain. The mere fact that the party is not able to do the same kind of work that he has been accustomed to do is not in itself evidence that he is unable to earn a livelihood in any employment. The question is, is he able to earn a livelihood? The fact that he has been unable to obtain employment does not mean that he was unable to earn a livelihood. The question is, if he had obtained employment, any employment, could he have earned a livelihood in such employment as he could have obtained? * * * The plaintiff must show that he has been unable to earn a livelihood

1914.]

Hughes v. Railway.

in any employment before he is entitled to recover under the terms of this agreement. * * *

"In considering the question whether the plaintiff was able to earn a livelihood in any employment, it is the question whether this plaintiff was able to earn a livelihood in any employment, taking into consideration his condition and his ability as it has been presented to you from the stand and all the facts and circumstances as have been produced in evidence."

The jury found for the plaintiff.

It seems to me that the question whether the plaintiff was able to earn a livelihood in any employment was purely a question of fact to be submitted to the jury. It is said that there was no evidence to go to the jury on this question; but the fact that the plaintiff had no employment during the time for which benefits are claimed, taken in connection with the physical fact, to-wit, the plaintiff being deprived of his right hand, was sufficient to have the jury pass upon the question whether the plaintiff in that condition was able to earn a livelihood in any employment.

In *McMahon v. Supreme Council, Order of Chosen Friends*, 54 Mo. App., 468, the court passing upon a question of this kind, said at page 472:

"A physical ailment which would render an illiterate laboring man totally unfit to earn a livelihood might not prevent a lawyer from practicing his profession, or take away from him all other chances of earning a living in some other avocation. therefore, in determining the liability in such a case, the courts must consider both the mental and the physical capabilities of the assured, otherwise such a benefit certificate would be a delusion and a snare. * * *

"In determining whether the plaintiff was disabled to such an extent as to prevent him from pursuing some other avocation in which he could earn a livelihood, his former occupation, his education and business experience, his natural abilities, and his age must be considered. * * * We, therefore, conclude that the court committed no error in submitting the case to the jury."

In *Keith v. C., B. & Q. Railroad Co.*, 82 Neb., 12, the court held, in passing on a question of the same kind as the one at bar,

that a plaintiff would be entitled to benefits who was unable to earn a livelihood in the same character of employment. But it is unnecessary to follow this case under the instructions given to the jury.

In submitting the case to the jury, the court followed the ruling of the court in *Lyon v. Railway Passenger Assurance Co.*, 46 Iowa, 631, and the jury having found in favor of the plaintiff and there being some evidence which justified this verdict, I can not say that it was so manifestly against the weight of the evidence as to justify setting it aside.

The other questions of fact in the case, namely, whether the plaintiff had complied with all the regulations of the company so as to entitle him to share in the benefits, were submitted to the jury under proper instructions and the jury found in favor of the plaintiff, and the verdict of the jury on these questions can not be said to be so manifestly against the weight of the evidence as to justify setting aside the verdict.

For these reasons the motion for a new trial will be overruled.

1914.]

Steel Castings Co. v. Farkas.

ADMINISTRATION OF ESTATES OF FOREIGNERS.

Common Pleas Court of Crawford County.

THE BUCYRUS STEEL CASTINGS CO. v. DR. GERZA FARKAS,
ADMINISTRATOR.

Decided, January Term, 1914.

*Wrongful Death of a Foreigner—Authority of the Probate Court to
Appoint an Administrator—Chose of Action in Favor of Wife
Part of Decedent's Estate.*

1. The probate court has no jurisdiction under Section 10604 of the General Code to appoint an administrator for the estate of a decedent not "an inhabitant of this state" at the time of his death.
2. But, under Section 8, Article IV, of the Constitution of Ohio, the probate court of this county has jurisdiction of the subject-matter of the administration of decedent's estate, and having such jurisdiction, may, by virtue of the provisions of the treaty of the United States with Austria-Hungary by force of the second clause of Article VI of the Constitution of the United States, without any statutory provision therefor, appoint an administrator of the estate of a subject of that empire, not "an inhabitant of this state," but who died here leaving an estate in this county.
3. The chose in action in favor of the wife and children for wrongful death, under Sections 10770 and 10772 of the General Code, is a part of the decedent's estate, though in a limited or qualified sense, and warrants the appointment of an administrator for it whether he left any general estate or not.
4. Administration is a proceeding *in rem*, and whether this chose in action is a part of the estate or not, it is a trust which the statute provides shall be administered through an administrator appointed by the court.

Finley & Gallinger, for plaintiff in error.
Leuthold & McCarron, contra.

DUNCAN, J.

This case is here on error from the probate court of this county.

On December 6th, 1910, that court appointed one Dr. Gerza Farkas, administrator of the estate of one Andrew Frat, killed by accident September 14th, 1910, while in the employ of the Bucyrus Steel Castings Company in this county. The said Frat was an alien with wife and child in his native land, of Austria-Hungary, whom he was supporting. He came with no intention of making this his permanent home. He was here to obtain work. He had worked in Cleveland and Columbus, and for a little over three months just previous to his death, in Bucyrus. He was under no fixed term of employment, sent his wages home and always had the intention of returning to his family. He died intestate and left no estate except a claim against said company for wrongful death.

The appointment of Dr. Farkas was made upon the suggestion of Hon. Ernest Ludwig, Consul for Austria-Hungary, located at Cleveland, Ohio.

On December —, 1910, the said administrator commenced an action in this court against said company to recover damages in the sum of \$10,000 for the alleged wrongful death of said decedent, under favor of Sections 10770 and 10772 of the General Code.

On November 29th, 1913, the said company filed a petition in the probate court to vacate the said appointment upon the ground that the said Frat was not an "inhabitant" of Ohio, and for the further reason that he left no estate here to be administered. The question is, therefore, one of jurisdiction.

I agree with plaintiff in error that said Frat was not an "inhabitant" of Ohio at the time of his death so as to authorize the probate court of this county to appoint an administrator for his estate under Section 10604 of the General Code. That section reads as follows:

"Upon the death of an inhabitant of this state, letters testamentary or letters of administration on his estate, shall be granted by the probate court of the county in which he was an inhabitant or resident at the time he died."

An "inhabitant" is "one who dwells or resides permanently in a place, as distinguished from a transient lodger or

1914.]

Steel Castings Co. v. Farkas.

visitor; one who has a legal settlement in a town, city, or parish; a permanent resident" (Webster). It implies a more fixed and permanent abode than "resident"; frequently imports many privileges and duties to which a mere resident could not lay claim or be subject (*Board of Supervisors v. Davenport*, 40 Ill., 197). One domiciled; one who has his domicile or fixed residence in a place, in opposition to a mere "sojourner." *Holmes v. Oregon & C. Ry. Co.*, 5 Fed., 523, 527; *Borland v. Boston*, 132 Mass., 89, 98; *Kennedy v. Ryall*, 67 N. Y., 379, 386; *State v. Boyd*, 31 Neb., 682 [48 N. W. (Neb.), 739, 752]; *Boardman v. Bickford* (Vt.), 2 Aikens, 345, 348; *In re Town of Hecktor*, 24 N. Y. Supp., 475, 476; *Merritt's Heirs v. Morrissitt*, 76 Ala., 433, 437.

But it is not necessary that said Frat should have been an "inhabitant" of Ohio to authorize the probate court to appoint an administrator for his estate. Section 8 of Article IV of the Constitution of Ohio provides that "the probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians," etc., and hence, has jurisdiction of the subject-matter of decedents' estates irrespective of statutory enactment.

Article XI of the treaty of commerce of August 27th, 1829, between the United States of America and Austria-Hungary, reads as follows:

"The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise; and their representatives being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases."

Article XV of said treaty reads as follows:

"Consuls-general, consuls, vice-consuls and consular-agents, also consular-pupils, chancellors and consular officers shall en-

joy in the two countries all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the *most favored nation*."

This "most favored nation" clause is now common in treaties of commercial nature. The clause not only binds the nation to grant to its co-signers all the privileges similarly granted to all other nations, but such also as shall be granted to them under *subsequent treaties*. International Law, Wilson & Tucker, 5th Ed., p. 216.

Under this "most favored nation" clause, therefore, Article IX of the treaty of 1853 between the United States and the Argentine Republic, the consul of Austria-Hungary is entitled to exercise and enjoy all the liberties, prerogatives, immunities and privileges granted therein to the consul in this country of the Argentine Republic. It reads as follows:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

And under Article XXVII of the treaty of April 20th, 1903, with Spain, this right is extended the foreign consul to represent "the absent, unknown or minor heirs, next of kin, or legal representatives of the citizens or subjects" of his country, dying within his jurisdiction.

The effect to be given to such treaty is provided by the second clause of Article VI of the Constitution of the United States as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

1914.]

Steel Castings Co. v. Farkas.

And the Supreme Court of Ohio in *State v. Vanderpool*, 39 O. S., 273, 276, in speaking of this provision of the constitution in connection with an extradition treaty between this country and Great Britain has this to say:

“This treaty is therefore the law of the land, and the judges of every state are as much bound thereby as they are by the Constitution and laws of the Federal or State governments. It is therefore the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself.”

Coming now to a matter in closer relation to the present case it is held in *McVoy v. Wyman*, 191 Mass., 276 (77 N. E., 379), that the existing treaties between this country and Russia are the supreme law of the land, and that the petition of the representative of that empire for the commonwealth of Massachusetts to be appointed administrator of the estate of a Russian subject who died here, must be granted as against the petition of the public administrator for the same appointment. That is to say, that when anything in the Constitution or laws of a state are in conflict with a treaty, the latter must prevail. See also *Telfren v. Fee*, 168 Mass., 188 (46 N. E., 562).

So that, giving effect to this provision of the Constitution of the United States and the treaty of this government with Austria-Hungary, it became the duty of the probate court to appoint an administrator for the estate of said Frat upon the suggestion of the consul of his government to the end that his representatives might succeed to his estate, regardless of any provision of the statute in that behalf.

Thus far I have proceeded upon the theory that there was an estate of the decedent to be administered.

In one sense, if the decedent left no estate to be administered, there would be no reason for the appointment of an administrator. This leads us to inquire the nature of a claim for wrongful death. Section 10770 of the General Code creating the liability reads as follows:

“When the death of a person is caused by wrongful act, neglect or default, such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, in every such case the corporation which or the person who, would have been liable if death had not ensued * * * shall be liable to an action for damages.”

The right of action is provided for by Section 10772 as follows:

“Such action shall be for the exclusive benefit of the wife, or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death was so caused. It must be brought in the name of the personal representative of the deceased person; and the jury may give such damages not exceeding ten thousand dollars, as they think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit the action is brought.”

Under like sections of the statute it was held in *Steel, Admr., v. Kurtz*, 28 O. S., 191, that the money thus realized is not to be treated as part of the general estate of the decedent. That the administrator is a trustee of the fund and must distribute such money to those to whom the general personal estate would descend according to the statutes of descent and distribution. And in *Wolf, Admr., v. L. E. & W. Ry. Co.*, 55 O. S., 517, it was held that the administrator is a mere nominal party, having no interest in the case for himself or the estate he represents, but that such actions are for the exclusive benefit of the beneficiaries named in the statute.

By Section 10773, General Code, it is provided as follows:

“Such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, at any time, before or after the commencement of a suit may settle with the defendant the amount to be paid. The amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment in such manner as will be fair and equitable, having reference to the age and con-

dition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate.”

In *B. & O. R. R. Co. v. Haltman, Admr.*, 1 C.C.(N.S.), 17, it is held that a settlement by the widow and administratrix of a decedent, killed by wrongful act, is void as against the minor children of the deceased, where it does not appear that the probate court consented to and approved the settlement.

While it may be said that this chose in action is no part of the general estate of the decedent, it is his estate in a limited or qualified sense. It arises from a personal injury to him for which he would have had a cause of action had he lived, and the statute simply revives it in favor of his dependents—wife and children—thus excluding his creditors. In this respect the estate differs from the *general estate*, but in no other. The suit must be brought by the administrator; he can not settle it without the consent of the probate court, and in the absence of agreement among the beneficiaries, he has no authority to make distribution of the proceeds of the action.

In support of this holding, I cite *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn., 5, 6 (46 N. W., 79, 80), construing like statutes of that state where the court say:

“Administration is a proceeding in rem, the res being the estate of the deceased; and we apprehend that, whether the deceased was a resident or non-resident, the existence of assets is essential to administration, for it is the estate, and not the expired breath, of the deceased upon which administration operates. Hence it would seem to follow, from appellant’s logic, that if the deceased left no assets, strictly so-called, no administration could ever be had, and consequently the statutory right of action for the benefit of the next of kin could never be enforced. This right of action is given in case of the death of any person, whether a resident of the state, or only temporarily sojourning in it, at the time of his receiving the injuries causing his death. The law will not allow it to be defeated for want of a party to maintain it. The fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it, and administer the proceeds in accordance with the statute.”

In *Missouri Pac. R. R. Co. v. Bradley*, 51 Neb., 596, 7 (71 N. W., 283, 4), the court reviews the holdings on the subject, approves the reasoning of the Minnesota case and says:

"The weight of the adjudications is in favor of the right to have an administrator appointed for the sole purpose of prosecuting an action arising under Lord Campbell's act, even though there exist no other necessity for such an appointment, and the deceased was not domiciled in this state, and left no property therein, and that the county court of the county where the injury was received and the deceased dies may properly entertain such jurisdiction."

See also *Findlay v. Railway Co.*, 64 N. W. (Mich), 732; *Railway Co. v. Lewis*, 40 N. W. (Neb), 401; *Railroad Co. v. Andrews*, 36 Conn., 213; *Morris v. Railroad Co.*, 23 N. W. (Ia.), 143; *Pinney v. McGregory*, 102 Mass., 186; *Brown's Admr., v. Railroad Co.*, 30 S. W. (Ky.), 639.

But suppose this right of action can not be said to belong to the estate of the decedent and that the administrator is a mere trustee and has no interest in the claim, still that does not deprive the probate court of the power to appoint *that* trustee. The statute provides for it. And if the appointment is to be denied where the decedent was *not* an inhabitant simply because there is no general estate to administer, it can not be made where the decedent was an inhabitant. Certainly that was not the intention of the law-making power. Such interpretation would lead to absurd consequences and should be avoided. If there is no general estate to administer he may not be a general administrator in that sense, but he would be a trustee, at least, under the name "administrator" to prosecute the action. A contrary holding would defeat half the appointments made where suit is brought for wrongful death.

The case of *P., C., & St. L. Ry. Co. v. Naylor, Admr.*, 73 O. S., 115, indicates the public policy of such legislation and interprets these sections of the statute in such way as to leave no doubt as to the right of the probate court to appoint an administrator to bring such action in behalf of the wife and children of an alien decedent. In that case it was alleged

1914.]

Steel Castings Co. v. Farkas.

as a defense "that the plaintiff ought not to have or maintain this action for the reason that the defendant is and was on the 6th day of June, 1902, a citizen and resident of the state of Ohio; that the said Basilio Marino was at the time of his death a native and citizen of Italy; that the wife and children of the deceased for whose benefit this action has been brought, are non-resident aliens of the state of Ohio and of the United States of America; that as such non-resident aliens they are not authorized by the statutes of the state of Ohio to recover damages through a legal representative for the death of said Basilio Marino." This defense was demurred to. The Supreme Court in affirming the circuit court in sustaining the demurrer points out that the words "when the death of a person is caused by wrongful act," etc., as used in the statute, does not mean in certain cases, but in all cases. That the words "such action shall be for the exclusive benefit of the wife" etc., are general, include all cases and mean that the wife and children are not limited to those who may reside at the time in this country. And that a non-resident foreigner coming into this jurisdiction and asking redress for an injury done to him in this state and contrary to the laws of this state, is entitled to be heard in the same manner as a resident foreigner or a citizen. And I add to this, they would be denied that right if the probate court had no jurisdiction to appoint an administrator to prosecute the action.

There is also a serious question as to whether said company has any standing in court to make the motion to vacate the said appointment, and indeed there is very good authority for holding that it has not (*Railroad Co. v. Gould*, 64 Ia., 343 [20 N. W., 464]; *White v. Spaulding*, 50 Mich., 22 [14 N. W., 684]; *Missouri Pac. R. Co. v. Bradley*, 51 Neb., 596 [71 N. W., 283], but finding more satisfactory grounds upon which to base the decision, I have not gone into that matter.

Holding these views, the probate court will be affirmed. Judgment against plaintiff in error for costs, and case remanded for execution.

**PROTECTION OF THE INTERESTS OF ALL IN
FIXING FEES.**

Superior Court of Cincinnati.

JOSEPH BUSCHLE v. THE BUSCHLE MANUFACTURING COMPANY.

Decided, February 11, 1913.

Fees in Receiverships—Allowance of, to an Attorney Will be Determined Upon the Merits of His Claim—Notwithstanding Esprit de Corps Prevents Counsel From Objecting to an Allowance.

Fees will not be allowed to plaintiff's counsel out of a fund in the possession of the court unless plaintiff or his counsel have rendered services the effect of which is to conserve or add to such fund. Where plaintiff himself has participated in acts which have diminished that fund no fee will be allowed his counsel therefrom.

L. H. Pummill, for the motion.

Burch, Peters & Connolly, contra.

OPPENHEIMER, J.

This case comes on now to be heard upon a motion filed by L. H. Pummill, counsel for plaintiff, for fees "for his services in the preparation, bringing and trying the above cause from its inception until the receiver was appointed herein."

It is always somewhat awkward to determine applications for the allowance of fees in receivership cases. We believe that we are justified in taking judicial notice of the fact that there is a certain *esprit de corps* among attorneys which prevents them from interposing objections to the allowance of fees. Accordingly in this case, counsel for the receiver have stated that they are not opposing the application. But it is the duty of the court to protect the interest of all parties involved, and to see to it that the funds which should be available for distribution among creditors are not paid out to those who have neither equitable nor legal right to them. The court must do justice, not merely to

1914.]

Buschle v. Manufacturing Co.

attorneys, but as well to others who must look to it for its protection but who have not the same opportunities for presenting their claims.

The petition in this case was instituted on behalf of the plaintiff as stockholder in the defendant corporation. He alleged that certain parties had improperly persuaded him to turn over his business to a corporation to be organized by them; that defendant corporation was accordingly formed under the laws of the state of Ohio with a capital stock of \$100,000, and that he thereupon turned over his business to said corporation in return for \$40,000 of the capital stock. He further stated that all the proceedings of the corporation thereafter were unlawful; that the requirements of the statutes with reference to meetings and the keeping of minute books and similar details were disregarded; that his associates upon the board of directors were fraudulently dissipating the assets of the corporation, and conspiring to ruin the business; that the corporation had failed in the object of its creation, and that it was insolvent. Plaintiff therefore prayed that the alleged board of directors and officers be enjoined from managing and controlling the business and that a receiver be appointed.

Upon the trial of the case plaintiff totally failed to sustain any of the allegations of his petition except that the corporation was insolvent. It appeared that the incorporation of this company was a rather remarkable exhibition of "high finance." The total assets of the business consisted of machinery and stock in trade, valued conservatively at five or six thousand dollars, and a valueless formula for the making of ten-pins. Yet \$40,000 in capital stock was issued to plaintiff in return for these physical assets, and \$40,000 in stock to H. J. Scheid for the valueless formula which could never be used. The alleged dissipation of assets consisted in the execution of a note for \$3,000 to Orville K. Jones for alleged legal services; but no fraud was shown in connection with this transaction and plaintiff himself signed the note. Nor did there appear to be anything irregular in the organization of the corporation or the conduct of its affairs,

except that the physical assets of the corporation were entirely submerged in the water which composed most of the stock. As heretofore stated, this left no allegation proved, except that the corporation was insolvent, and mere insolvency is not a sufficient ground for the appointment of a receiver. General Code, Section 11894; *Building Company v. Rehn*, 6 N. P., 185; *Fruit Company v. Dox*, 4 N.P.(N.S.), 155; *DeLacroix v. Steel Company*, 8 N.P.(N.S.), 489; *Bank v. Lakeside Co.*, 19 C. C., 365.

However, at the conclusion of the hearing it was admitted by all parties that the corporation was actually insolvent, and a number of the creditors who were represented joined in a request that the court appoint a receiver for the purpose of conserving the assets. This request was concurred in by all the stockholders, including plaintiff, and a receiver was thereupon appointed.

It is undoubtedly the rule that where an attorney brings into court a fund which he has assisted in creating or conserving for the benefit of creditors, or to which his labors or those of his client have added, he is entitled to a fee to be paid out of such fund, but we can not see how plaintiff's counsel in this case is justified in claiming the benefit of this principle. So far as his petition is concerned, he failed utterly in sustaining those allegations which were necessary to give the court jurisdiction. Moreover, it appeared that his client himself had contributed largely toward bringing about the condition which was apparent. It is therefore our opinion that instead of assisting in conserving the assets for creditors, plaintiff himself had rather assisted in dissipating the assets, and it was only the united request of those who stood practically in the position of defendants which brought the fund into court and prevented further loss.

We are therefore of the opinion that counsel will have to look to his own client for fees, and that it would be unconscionable for us further to diminish the fund available for the creditors by paying any portion of it to the applicant.

A number of cases have been cited to us but we do not believe that any of them shed any light upon the case at bar.

1914.]

Snider v. Car Co.

CONTINUANCE OF CAUSE AFTER TRIAL HAS BEGUN.

Common Pleas Court of Hamilton County.

CHRIS SNIDER V. THE CINCINNATI CAR COMPANY.

Decided, March 14, 1914.

*Trial—Custom of Withdrawing a Juror and Continuing Cause Obsolete—
Discharge of Entire Jury Proper Method, if Statutory Necessity for
Continuance Exists—Sections 11453 and 11454.*

1. If in a trial, after the jury is sworn, there be a legal reason to continue the case, the entire jury must be discharged, and it is not necessary to first use the fiction of withdrawing a juror.
2. Such reason for a continuance can not be based upon the bare request of a party, and does not rest in any discretion of a court, but must be founded upon some statutory necessity or reason.

George H. Warrington and Robert S. Marx, for the motion, offered: *Rau v. Residen*, 11 C.C.(N.S.), 255; Section 11453, General Code; Section 11586, General Code; *Hines v. State*, 24 Ohio St., 134; *Dobbins v. State*, 14 Ohio St., 493; *State v. Behmer*, 20 Ohio St., 572, 576.

Littleford, James. Ballard & Frost, contra, offered: *Rau v. Residen*, 81 Ohio St., 538; *Wolcott v. Studebaker*, 34 Fed. Rep., 8; *Schofield v. Settley*, 31 Ill., 515; *Miller v. Metzger*, 16 Ill., 390; *Morrison v. Hedenberg*, 138 Ill., 22; *Van Sycle v. Perry*, 3 Robt., 621; *Glendening v. Canary*, 5 Daly, 489 (aff'd 64 N. Y., 636); *Messenger v. Fourth Natl. Bank*, 6 Daly, 190 (affirming 48 How. Pr., 542); *People v. Marks*, 10 How. Pr., 261; *St. John v. Duncan*, 2 N. Y. Month. L. Bull., 20; *Planer v. Smith*, 40 Wis., 31; *Stodhart v. Johnson*, 3 T. R., 657; *Bentley v. Daws*, 10 Exch., 347 (23 L. J. Exch., N. S., 279, 18 Jur. 837); *Thomas v. Lewis*, 5 Dowl. P. C., 395 (W. W. & D., 67; 1 Jur., 104); *Norburn v. Hilliam*, L. R. 5 C. P. (39 L. J. C. P. [N.S.], 183; 22 L. T. [N. S.], 67; 18 Week Rep., 602; *Harries v. Thomas*, 2 Mass.

N. W., 32; Thomas v. Leonard, 5 Ill., 556; Moscati v. Lawson, 1 Rob. & M., 454 (1 Harr. & W., 572); Sheldon v. Bahner, 4 Pa. Co. Ct., 16; People, ex rel Perkins, v. N. Y. Common Pleas Judges, 8 Cow., 127; 38 Cyc., 1593; 21 Enc. Pl. & Pr., 1002; Abbot's T. R. Br. Civ.; Section 11453, General Code; Section 11363, General Code; Section 11366, General Code; Booth v. Langley, 51 S. C., 412, 416; Yellow Pine Co. v. Gutwilly, 46 N. Y. S., 25; Rawson v. Silo, 93 N. Y. S., 416; Rosengarten v. Central R. Co., 69 N. J. L., 220; Pirrung v. Supreme etc., 93 N. Y. S., 575; Cook v. Dean, 21 So. C., 327; Cook v. Cottrell, 4 Strob., 61; Brown v. Manhattan, 81 N. Y. S., 755; Hale v. Hale, 32 Pa. Super. Ct., 37; Surface v. Bentz, 228 Pa. St., 610; Greenburg v. Schindle, 128 N. Y. S., 661; Connolly v. Railroad, 230 Pa. St., 366; Brown v. Railroad, 43 Pa. Sup. Ct., 61; McKahan v. Railroad, 223 Pa. St., 1; Adler v. Leser, 110 N. Y. S., 176; Crane v. Blackburn, 100 Ill. App., 565; Schultze v. Huttlinger, 135 N. Y. S., 70; Huntington v. Tol. R., 175 Fed., 532; Railroad Co. v. McCormick, 23 Ind. App., 258, citing Chandler v. Bicknell, 5 Cowen, 30; United States v. Coolidge, 2 Gale, 364.

DICKSON, J.

This action is for damages for personal injuries claimed to have been caused by defendant's negligent maintenance of a switch.

From the evidence it is clear that the defendant did not maintain the switch.

After motion by defendant for an instructed verdict and after argument thereon, but before the court ruled, plaintiff, in accord with a custom in this court, requested a juror to be withdrawn and the case continued for the purpose of amendment.

The court, for the stated express purpose of testing this custom, withdrew the juror and continued the case against defendant's objections and exceptions.

1914.]

Snider v. Car Co.

Steps have been taken by the defendant to perfect error proceedings in this regard, and too, the defendant now files motions to set aside the entry withdrawing a juror and the continuance and also for judgment on the pleadings and the evidence.

The court is of the opinion that the custom of withdrawing a juror is without reason and is obsolete in this age of practical progressive law. If there be a right to continue a case, and a jury be in the way, clearly the better—the only above-board—method is to discharge the entire jury. The absurd fiction that a purposely withdrawn juror is lost, mislaid or destroyed and thus there is a mistrial, is only a deceit and should never be used. Both sides will as readily consent to the discharge of the entire jury—a more manly course and one understood and better appreciated by the parties and the men on the jury. No custom can override the written code.

Our Circuit Court in *Rau, Exrx., v. Risiden*, 11 C.C.(N.S.), 255, construing Section 11453 and 11454, General Code, has held that there is no power to discharge a jury after trial has begun and before the verdict, unless upon the finding of some necessity, or upon consent of both parties, and can not be done under any discretionary power invoked by a bare request of the plaintiff to help him in a dilemma.

Section 11454. General Code, gives the court power to direct after dismissal an immediate retrial. Surely such power was not given the court to arbitrarily set aside rule days and thus punish the defendant for the plaintiff's fault.

The holding of our circuit court was not disturbed by the reversal of the *Rau* case in our Supreme Court, same title, 81 Ohio St., 538. The reversal there was because the error prosecuted was not from a final order.

The circuit court will remand this cause to this court for trial. For this reason we will meet the defendant's motions now and save valuable time.

Without doubt the pleadings and the evidence clearly showed that no case had been made against the defendant. This the plaintiff realized, and then by his motion sought to avoid a judgment.

It is clear this court had no right to discharge the jury on plaintiff's bare request.

The entry withdrawing a juror and continuing the case will be set aside; and coming now to consider the defendant's motion for final judgment on the pleadings and the evidence, the court find that while it is true that strictly according to the letter of the law it could enter judgment, yet because Section 10214, General Code, provides, "the provisions of part third and all provisions under it shall be liberally construed in order to promote its object and assist the parties in obtaining justice, * * *" the court find that plaintiff may dismiss without prejudice or if the plaintiff refuse, then the court might under the testimony and the pleadings render judgment for the defendant.

1914.]

Thuma v. State.

**EVASION OF THE LICENSE STATUTE RELATING TO
CHATTEL LOANS.**

Common Pleas Court of Franklin County.

**BEN L. THUMA V. STATE OF OHIO, AND CHESTER F. BIGHAM V.
STATE OF OHIO.**

Decided, October 20, 1913.

*Loans on Chattels or Wages—Application of the Statutory Requirement
as to the Licensing of Lenders—Evasion of the Statute Held to be
a Transgression Thereof—Section 6364-1.*

The loaning of money on chattel or personal property of any kind, without having first obtained a license therefor as provided by statute, is a punishable offense, notwithstanding the paper which was signed by the borrower and which he was led to believe was a chattel mortgage, was not a mortgage or valid instrument which could be enforced against him.

DILLON, J.

The plaintiff in error, Thuma, was charged in the police court of the city of Columbus with a violation of the act to regulate and license the loaning of money upon chattel or personal property of any kind, etc. 102 O. L., 469.

The charge in brief is that the defendant did unlawfully "carry on the business of making loans upon personal property by then and there loaning the sum of \$50 to one Nettie Johnson upon certain personal property, without first having then and there obtained a license so to do from the Secretary of State."

The facts, as they were developed at the trial of the case, present a unique situation. From a consideration of this case and another somewhat similar case (*Bigham v. State*) which is also decided herein, it develops that after the passage of the act above mentioned, some of the so-called chattel loan concerns have adopted various plans to escape a violation of this statute by evading a literal transgression of its terms.

Bearing in mind the true function of the court, on the one hand to avoid any unwarranted extension of legislation to cover conditions not fairly embraced within the terms of the act, i. e.,

so-called "judge-made legislation"—and on the other hand to give to legislation the fair interpretation of the terms used, having reference to the evils sought to be cured, the court has determined that the business as carried on and conducted by the defendants below fell within the terms of the statute.

The affidavit would have been sufficient to have charged that the defendant carried on the business of making loans upon personal property, etc., without specifying any one particular action. But the particular transaction which was relied upon by the state is typical of the business as carried on generally.

The applicant for a loan signed what was represented to her to be a chattel mortgage, and she firmly and positively believed that she had signed such chattel mortgage. Upon the payment thereof all the wording of the instrument was cut off and the lower part containing her signature, stamped paid, was returned to her. A blank form of the instrument as used was produced by the defendant below, however. The defendant testifies that he was the general manager of the business, which was owned by a partnership consisting of two men. The applicant was asked for and did give a list of certain chattel property. The paper writing therefor, which the applicant supposed and believed to be a chattel mortgage, was given her and she signed the same. This instrument recites that the applicant, in consideration of "the United States Credit Agency Company signing as a surety for her on the loan, did convey and mortgage the said goods and chattels unto said agency company." This also contained the usual conditions as to this credit agency having gone upon the applicant's note for surety, etc. As a matter of fact no goods were described in the instrument.

There was a further provision in the instrument whereby she paid to said credit agency a certain sum of money for its services. The note itself was made out to the defendant below, or to some one member of his firm. The note likewise when paid had this information torn from it and only the lower part of the note containing the signatures was stamped paid and returned to the applicant.

The reason for thus cutting out the body of the chattel mortgage, etc., was frankly stated by the defendant to be for the

1914.]

Thuma v. State.

purpose of concealing from their customers the fact that it was not a chattel mortgage, etc.

The defendant below testified that when the applicant signed the paper, as she supposed a chattel mortgage, there was nothing on it except the printed matter, and his name as a witness. It was dated and numbered to conform with the note, however. He further states that there was no description of furniture in it, the list of furniture which had been furnished according to him being kept separate.

The nature of the business is further illustrated by notices which were sent regularly to the applicant calling attention to the date when the next payment must be made, and quoting the law of Ohio, in prominent type, which makes it a crime for any person without the consent of the owner, to remove his mortgaged property from the place where it was situated, etc.

The first claim of counsel for this plaintiff in error is that this law does not apply to the defendant, who was general manager of the loan company. I concede that if the company itself as such partnership, had taken out the license as required by the statute, that mere employees of that company would not be compelled to take out a license. But certainly this protection to an employee can not be extended to a general manager of a concern having, as he testifies, been in the business for many years and who, with full knowledge, enters into and becomes one of the joint principals in the commission of the unlawful act.

The statute very plainly says that no person, firm or corporation shall engage or continue in the business of making loans upon personal property without having obtained a license to do so.

From all the facts in this case it is perfectly clear that each and every one of these parties were joint conspirators in the business of making loans without license, and each is responsible, therefore, for the act of the other, since they are engaged in a common plan. For these reasons, I do not consider it was necessary that the defendant below should be charged as an employee of the partnership.

Counsel for plaintiff in error frankly states that this was a "phony" mortgage and that the whole transaction was not

worth the paper it was written on, but the applicant thought she had signed a mortgage and was led to believe that she had executed a mortgage in the usual way. Necessarily the result, so far as the loan company is concerned, was the same as if she had given a genuine chattel mortgage.

In the Bigham case mentioned above, the facts are somewhat different. The same charge was made in that case. In Bigham's case the usual inquiry was made as to the furniture and as to any claim thereon, there being, according to the application signed by the applicant, a balance owing the furniture company of \$35.

Here again the applicant positively swears that he signed a chattel mortgage in addition to the other paper statements as to the property. The defendant below produces a paper which is not a chattel mortgage at all, and simply recites that the applicant and his wife make application for a loan of \$35, and appoints the City Loan Company as the agent of the applicant to investigate the title of the within described personal property, and to investigate the applicant's standing and credit in the city of Columbus in the manner that seemed best to them. There were a few other recitals; among other things, the amount which they agreed to pay, certain sums of money, commissions, etc. Then follows a most significant statement: "In negotiating and procuring this loan we have signed an application, two promissory notes and this paper, and no other." The evidence of the applicant tends to show that not only did they sign this paper, but a real chattel mortgage besides. Whether they did or not need not be here determined since the court is of the opinion that the case should be decided upon the transaction as testified to by the defendant in this respect.

In this case, as an instance of the deception practiced, a short time prior to this loan in the case of another customer who desired to move from her home at 360 North 20th street to 200 North 20th street, a certificate was given to that particular customer giving her permission to move the household goods. This customer evidently also was duly impressed with the statutes of Ohio with reference to moving mortgaged property.

Taking both the foregoing cases together, the simple question arises whether or not these transactions constituted "loans

1914.]

Thuma v. State.

upon chattels or personal property of any kind whatsoever." It is claimed on the part of counsel, and with much force, that to constitute a loan upon personal property, that personal property must be mortgaged or pledged. In support of their contention they present the case of *State v. Cotton*, 128 La., 749. In that case an act was under review which imposed a license tax upon persons engaged in the business of lending money on wages or salaries, or purchasing time, wages or salaries of wage earners. In that case the state attempted to construe the phrase "lend money *on* wages or salaries" meant lending money *to* wage or salary earners. The court held that a loan on wages meant a loan by virtue of a pledge, assignment or mortgage.

I am of opinion that the expression of the statute "business of making loans upon chattels or personal property of any kind," having in mind the entire statute and its purpose before me, demands a wider interpretation than a limitation to chattel mortgages or pledge. It is not so limited by express terms. If it had been desired to so limit it it would have been a very easy and simple thing for the Legislature to have said so. We must remember that it is the business that is sought to be regulated and, therefore, any restraint upon chattels of the borrower which thereby secures to the lender any degree of security whatever, however slight, constitutes a loan upon personal property that is within the meaning of the statute. If the transaction did not avail to the lender some advantage, real or otherwise, why so much care taken with reference to the personal property?

It is claimed on the part of counsel for Bigham that this loan was made not upon any theory of restraint, pledge or mortgage upon his personal property, but solely upon the credit and standing of the borrower, and therefore was made purely upon the moral risk.

I am aware that a court might close its eyes and ignore the real transaction, and by some strict and unnecessarily technical construction arrive at that conclusion; but a reading of the transcript of the evidence in each case precludes any such conclusion here. The conviction, therefore, is not for *evading* the law.

Counsel are correct in the announcement that there is no statute providing for a punishment for evading the law. It is

State, ex rel, v. Fosdick.

[Vol. 15 (N.S.)]

the fact that they have transgressed this law in substance which is the basis of the court's decision here.

In the Bigham case the attention of the court is called to a number of erroneous rulings in the court below. I consider unfortunate the objections made by the prosecuting attorney and the rulings in the court below with reference to the defendant's exhibits one to six. But as the exhibits were finally offered and received in evidence the court can not find any prejudicial error in that respect. In such of these cases a witness was called from the Secretary of State's office to prove that no license had been taken out. And in the Bigham case counsel for the defendant below vigorously objected to any evidence on the subject. It is pertinent here to observe that the proving of a license is an exception to the rule of evidence requiring putting the burden upon the state. The fact of a person possessing or not possessing a license being peculiarly within the knowledge of the defendant, no evidence on that subject is necessary to be adduced by the state. The burden is upon the defendant to show he has a license.

**AS TO APPEAL TO THE COURTS IN CASE OF DISCHARGE OF
A CIVIL SERVICE EMPLOYEE.**

Superior Court of Cincinnati.

STATE OF OHIO, ON THE RELATION OF DANIEL B. LEROY, v. PHILIP
FOSDICK, DIRECTOR OF PUBLIC SERVICE, AND WILLIAM
LEIMANN, AUDITOR OF THE CITY OF CINCINNATI.

Decided, May 25, 1914.

*Civil Service—When Mandamus Lies to Restore a Discharged Employee
—Whether Good Faith Was Shown in Investigating the Case and
Making the Discharge Is the Only Question Which May be Inquired
Into.*

An employee of the city, in the classified civil service, was removed from his position by the director of public service, who furnished him with a copy of the order of discharge as required by the provisions of Section 17 of the civil service act, wherein was stated a legal and sufficient reason for discharge, but the discharged employee brought an action in mandamus wherein he prayed to

1914.]

State, ex rel, v. Fosdick.

be restored to his former position, alleging that he had been discharged for political reasons in violation of the provisions of the aforesaid section of said act. *Held:*

1. The court has no power to reinstate the relator on the ground that the reason assigned for his discharge was untrue or that it had no existence.
2. If, however, it appear clearly from the evidence that the reason assigned for the discharge was untrue or had no existence, and that the said director knew this but nevertheless employed it as a sham or cover for a discharge under the form of law, when as matter of fact the sole reason for the discharge was political as alleged, then, in the absence of any showing that the relator is otherwise ineligible, the court will issue a writ of mandamus to said director commanding him to reinstate the relator in the position from which he was so unlawfully removed.
3. If it appear that the director, in making the removal for the reason stated, acted in good faith, the court can not order the reinstatement of the relator, even though it further appear that the said director was mistaken as to the truth or the existence of the reasons assigned for the removal.
4. For the purpose of determining whether or not the director acted in good faith, and for that purpose only, the court may hear such testimony as is offered bearing on the truth or falsity of the reasons assigned for the removal.
5. The writ of mandamus can issue to a public officer only where a clear, legal right in favor of the relator and a plain dereliction of duty on the part of the officer have been established.

Alfred Bettman, for relator.

Charles A. Groom, Assistant City Solicitor, contra.

PUGH, J.

Daniel B. LeRoy, a fireman at the city hall, Cincinnati, and an employee in the classified service under the civil service act, was discharged from his position on April 13th, 1914, and brings this action wherein he prays that he be restored to his former employment by writ of mandamus issued to the director of public service, Philip Fosdick, a defendant in this case. He claims that he was discharged arbitrarily and for political reasons and that, under the provisions of the civil service law, his discharge was unlawful and void.

This claim of the relator is denied by the defendant, the said director of public service, and a further defense of disrespect and

insubordination is set up in the answer, but as will subsequently appear it is unnecessary for the purpose of this decision to consider this second defense. The claim stated in the petition against the second defendant, William Leimann, the city auditor, being wholly dependent upon the disposition of the cause of action against the first defendant, requires no special separate consideration at present.

It appears from the testimony that the relator, Daniel B. LeRoy, was at the times hereinafter mentioned and still is a Republican in politics, but that he was appointed, in February, 1913, to the position of fireman by a Democrat, the then director of public service, by being selected from an eligible list, based upon competitive examination and furnished said director on his requisition therefor, by the municipal civil service commission. It is admitted that, since the relator's aforesaid appointment there has been a change of administration and that the present director of public service is a Republican.

The provisions of the civil service act relating to the removal of employees in the classified civil service are contained in Section 17, as follows:

"No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended with a copy of the order of discharge, lay off, reduction or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission."

In compliance with the requirements of the above section, a copy of the order of discharge was furnished the relator and the reason assigned therein for his removal was stated as "sleeping while on duty." No complaint is made that any of the statutory formalities were omitted nor that he was not given a reasonable time within which to file an explanation. Indeed, it is in evidence that the relator did file an explanation in the

1914.]

State, ex rel, v. Fosdick.

form of a letter to the director in which he denied the accusation made in the order of discharge and refused to recognize the validity of his removal. It is conceded that the reason is stated in the order of discharge with sufficient definiteness and certainty and, if true, is an adequate reason for removal. The sole controversy in the case arises upon the relator's assertion that the reason assigned in the order of discharge was untrue as matter of fact and a mere sham and that the true reason for his discharge was political.

It is well settled by the decisions of other states whose civil service acts contain provisions like those of Section 17 above quoted, that in an action wherein a discharged employee seeks to be reinstated in his former position on the ground that he was unlawfully discharged, the court has no power to try the question, whether or not as matter of fact the reasons given for the removal were true. Upon consideration of these cases, it will be found that the rule of law upon the subject is that the court must determine from the circumstances whether the reasons stated for the removal were alleged in good faith or were merely a sham or cover for the removal, under formality of law, of an employee whom it was desired to get rid of for religious or political reasons. Further than this the court can not inquire.

In some states, it is required that before an employee in the classified list can be removed, he shall be furnished with written charges and be tried upon them before some board, tribunal, or officer, very much like the present law of this state in reference to employees in the fire and police departments (General Code, Section 4505). In other jurisdictions, the discharged employee is entitled to a written statement of the reasons for his removal and is granted the right to explain or justify himself in a written answer, as provided in Section 17 of the Ohio statute above quoted, but is accorded no right of trial. The rule as stated, however, applies in all cases, namely that, in the absence of statutory provision for an appeal or review of such charges by the court, the latter, when applied to for reinstatement by a discharged employee who claims that he was illegally removed, is limited in its inquiry to the question whether the charges

were made in good faith and have such relation to the office or position as, if true, to be ground for removal.

In construing a statute which bestowed upon a mayor the power of removal "for such cause as he shall deem sufficient," the Supreme Court of Massachusetts in the case of *Ayers v. Hatch*, 175 Mass., 489, used this language:

"The fact, however, that removals are to be for cause, repels the idea of removals at pleasure, even though the sufficiency of the cause is for him to decide. The question then arises, what jurisdiction has this court in regard to removals? The answer it seems to us is this. Cause implies, we think, a reasonable ground for removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then whether under the circumstances it is sufficient to justify a removal, is for the mayor to decide and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for the court to determine."

A like view of the court's jurisdiction under a civil service statute which contained provisions similar to those prescribed by Section 17 of the Ohio act, was taken in New York, where the court in *People, ex rel Walsh, v. Brady*, 62 N. Y. Supp., 603, made the following statement:

"When charges have a real basis or foundation, are made in good faith and not as a mere pretext for removal, and they are of a substantial nature, showing some neglect of duty on the part of the officer, or something which materially affects his official acts, or his standing and character, and the officer is given an opportunity to explain away the charge, which explanation is received and acted upon in good faith, then the sufficiency of the proof and the propriety of the removal under the statute, rest entirely with the removing officer."

In *People, ex rel Fonda, v. Morton*, 148 N. Y., 156, an employee was removed by the Governor of the state, acting under a constitutional provision which authorized such removals for "incompetency and conduct inconsistent with the position," there being no other limitation on the power of removal than is implied by the above language itself, and O'Brien, J., in passing on the legality of the removal, said:

1914.]

State, ex rel, v. Fosdick.

"The court can inquire with reference to a single question only and that is jurisdiction; but the power to inquire as to jurisdiction necessarily implies the right to examine into the nature and character of the charge in order to see whether it is in any proper sense a charge at all within the meaning of the Constitution."

Other New York decisions are to the same effect, see *People, ex rel Mitchell, v. La Grange et al*, 37 N. Y. Supp., 991; 2 N. Y. App. Div., 299; *People, ex rel Keech, v. Thompson*, 94 N. Y., 451; *Matter of Guden*, 171 N. Y., 529.

The civil service act of Wisconsin contains a provision which authorizes removal for "just cause" which is not "religious or political" and the Supreme Court of that state has held, in *State, ex rel Wagner, v. Dahl*, 140 Wis., 301, that what constitutes a "just cause" is matter of law for the court to determine, citing, at page 304, a number of authorities to that effect, but in Syl. 4, page 302, the extent of the court's jurisdiction to review the action of the discharging officer is thus limited:

"When the cause assigned is a "just cause" within the meaning of the statute, and there is nothing to show that he acted arbitrarily or in bad faith, a court will not review his decision as to the fact of the existence of such cause."

To the same effect is the case of *State, ex rel Bannen, v. Rose*, 140 Wis., 360.

In a later case, *State, ex rel Bannen, v. Arnold*, 151 Wis., 38, 40, it was held that the test of the legality of the discharge was whether the officer ordering it had acted in good faith and that the presumption of the law was in favor of his having done so. Hence, no relief could be afforded a discharged employee, even though it appeared that his removal had been made under mistake of fact.

The decisions above referred to are nothing more than the application to specific cases of the general principle which is thus stated by the Supreme Court of Ohio, in *State, ex rel Insurance Co., v. Moore*, 42 Ohio St., 103:

Syl. 2. "When a public officer is called upon to perform a plain and specific public duty positively required by law, ministerial in its nature, calling for the use of no discretion, nor

the exercise of official judgment, his performance of such duty may, upon his refusal and in the absence of other means of relief, be enforced by mandamus."

3. "When such officer, in determining upon the performance of a public duty, is called upon to use official judgment and discretion, his exercise of them, in the absence of fraud, bad faith, and abuse of discretion, will not be controlled or directed by mandamus."

The director of public service, in this instance, was called upon to determine whether he would retain or discharge the relator under the circumstances shown by the testimony in this case. Whether he decided to do the one thing or the other, necessarily he had to exercise his official judgment upon the conflicting statements of the witnesses. If this court interferes and sets aside his conclusion, it would amount to a substitution of the court's judgment and discretion for that of the director.

Although some courts state the rule in broader terms than others, there is a substantial agreement to the effect that where the power of removal of subordinates for cause, but without trial, is conferred upon an officer, the presumption of law is, in each particular instance, that he has acted in good faith, and that, in the absence of statutory provision, a court has no power to inquire into the truth of the causes assigned by him for any such removal or discharge further than to determine from the evidence in each particular case whether he acted in good faith or whether the removal was arbitrary, without any reasonable foundation whatever or whether made for political or religious reasons. To quote from one of the cases above cited (*State, ex rel Bannen, v. Arnold*, 151 Wis., 39, 40):

"If such were not the case, then, every time an appointing authority under the civil service law acts under the correlative power to discharge or remove he would do so in peril of having to justify his action in judicial proceedings by showing satisfactorily to some court of general jurisdiction, within his judicial district, that the cause assigned exists and is sufficient."

In order to determine whether the reasons assigned were genuine, *bona fide* causes for removal or whether the removal was arbitrary or made for religious or political reasons, it is ob-

1914.]

State, ex rel, v. Fosdick.

vious that the court, in many cases, must take into consideration what evidence there was before the removing officer and the extent to which it influenced his action. If the reasons assigned had no existence whatever and there was nothing whatever to induce a reasonable man to believe in their existence and this were coupled with the circumstances that the superior officer was a member of a different political party from that to which the discharged employee belonged and was eager and anxious to get his subordinates out of the way to make room for his own political associates, the court would have advanced materially toward a resolution of the question before it. For such purpose, but for no other, testimony as to the truth or falsity of the reasons set out in the order of discharge may be relevant, and for such purpose has been admitted in the trial of the case we are now considering.

Coming now to the consideration of the evidence solely with a view to the determination of whether the charges were made in good faith and really had any foundation or whether they were a sham, we find that the defendant, Philip Fosdick, director of public service, knew nothing whatever of these charges except what he was told by Eyrich, superintendent of public buildings, his subordinate. The charge was really made by Eyrich, upon circumstances alleged by him to have come within his personal experience. The director took the word of Eyrich without question and acted upon it by discharging the relator after receipt of the latter's letter of explanation, without further consideration of the subject. Under these circumstances, in making the present inquiry, it is but fair and reasonable to impute to the director any political or improper motives which are shown by the testimony to have influenced Eyrich in this matter. If these matters are not dealt with in this way a superior officer, who chose to repose implicit confidence in an untrustworthy subordinate, could remove any or all the employees in the classified service upon the recommendation of such subordinate and, when his reasons were challenged in a proceeding like this, could shelter himself and, what is far worse, render effective such discharges upon the plea of his own personal good

faith. We must deal with this case as if Eyrich were himself the removing officer; his superior having practically turned over his authority to his lieutenant in this transaction and adopted and ratified what the latter saw fit to do.

The testimony itself is very simple. Eyrich alleges that on April 10th, 1914, he found the relator asleep at his post in the engine-room of the city hall while on duty, and at once reported the fact to the chief engineer and sent him to see the state of affairs for himself. The chief engineer, Mesch, says that Eyrich reported that the relator was asleep and requested him to go and waken him, and that he went into the engine-room and found the relator sitting in a chair, with his head slightly bent forward like a man who was "thinking" and that upon being spoken to, Le Roy got up on his feet as anyone else would have done. Mesch testifies that he was not able to determine whether the relator was asleep or not. The relator, Le Roy, says he was not asleep. He did not see Eyrich at all, but remembers the chief engineer speaking to him. This is all the testimony there was on the subject.

The claim is made that Eyrich's conduct, as he describes it, was unnatural, that anyone, under the circumstances, would have spoken to and awakened the sleeping man—if he had really been asleep, and that his account of the circumstances is therefore suspicious and reflects discredit upon his testimony. The inference thus attempted to be drawn from Eyrich's conduct under the circumstances is hardly justifiable. It was quite natural that, instead of awakening the relator, Eyrich should have wished the chief engineer, the relator's superior, to see for himself that his subordinate was sleeping on duty, and his conduct, upon this supposition, is what would have been expected. If the story of the fireman being asleep was a fabrication of Eyrich's, why should he send the engineer to see for himself? If the relator had been awake, it was at least probable that the chief engineer would have seen it, and Eyrich would thereby have furnished the relator with a witness whose testimony would have betrayed his fabrication. It was mere chance that Le Roy was in such a position that it could not be seen at once whether he was asleep or awake.

1914.]

State, ex rel, v. Fosdick.

The relator testified that he was served with the order of his discharge by Eyrich and that, in the conversation that ensued, the latter said, "they" or "the boys are after your job, you ought to be more careful." This, however, is denied by Eyrich and the allegation can not be said to be proved.

In addition, it will be observed that the remark, assuming it was made, is perfectly consistent with Eyrich's claim that the relator was asleep while on duty.

The complaint that the explanation of Le Roy in answer to the charge against him was not received and considered by the director in good faith, that he paid no further attention and made no further inquiry or investigation is not of much force under the circumstances. There were but two possible witnesses, Eyrich, the accuser, and Le Roy, the accused, Mesch, the chief engineer, being wholly unsatisfactory and disclaiming any knowledge whatever on the only point in controversy. In his testimony, the director said truly that it was a case of one witness against another, and that he chose to believe Eyrich whom he knew rather than Le Roy whom he did not. There really was nothing more he could do under the circumstances. No inquiry or investigation could throw any more light on the subject, and, as matter of fact, after the investigation of counsel the hearing of all the witnesses and the trial of the case on its merits, neither court nor counsel have learned anything more on the subject than was known to Fosdick when he first read Le Roy's letter of explanation.

Taken all together, this testimony is inconclusive. If submitted to a fair and intelligent jury, no one could foretell the verdict; indeed, it is quite likely that such a jury would fail to agree.

The writ of mandamus can issue to a public officer only where a clear legal right in favor of the relator and a plain dereliction of duty on the part of the officer have been established (*State, ex rel J. R. Mills & Co., v. County Commissioners*, 20 Ohio St., 425, 430; *Ex parte Black*, 1 Ohio St., 30; *State v. Smith*, 71 Ohio St., 13, 38), and neither of these prerequisites are proved where the testimony is conflicting and doubtful as in this case.

Under these circumstances, it is not possible for the court to find from the testimony that the reason given for the relator's removal in the order served upon him was a sham and that there was no foundation whatever for the charge. Still less is it possible to find that the sole motive for the relator's discharge was political. It may be that, despite the fact that he has testified he was a Republican in politics, it was desired to get rid of Le Roy in order to put some one in his place for political reasons. Even so the case would fall within the intendment of the ruling in *State, ex rel Stephen Menner, v. Holmes*, decided recently by this court but not reported, namely, that where the circumstances are such that the discharge is legal on the grounds assigned in the order of discharge, it does not become unlawful because of the fact, if such it be, that the officer ordering the removal desired in addition to get rid of the relator for political reasons.

For the reasons stated the application for a writ of mandamus directed to the defendant, Philip Fosdick, director of public service, will be denied and the case against him be dismissed. As the claim in the petition against the second defendant, William Leimann, the city auditor, is dependent upon the writ of mandamus being issued to the first defendant, the relief prayed for as to him will also be denied and the case as to him be dismissed likewise.

INDEX.

ABATEMENT OF ACTIONS—

A cause of action for nuisance existing against the owner of real property abates at his death, the same as if the action were pending at the time of his death, and such cause can not be asserted in an action brought after his death against his estate. 424.

ABUTTING OWNER—

Basis upon which an abutting owner may recover, whose lands have suffered from erosion of the banks of a county ditch. 472.

ACCORD—

The rule that accord resting on mutual promises is not good without performance is applicable to a case involving the appropriation of land. 56.

ACKNOWLEDGMENT—

Distinguished from "publication." 476.

ACTION—

Right of, exists against a cemetery association for injury resulting from negligence of its officers and agents. 49.

An action for damages to property on account of the escape of the contents of a vault on the adjacent premises is an action for nuisance; such a cause of action abates with the death of the owner of the premises upon which the vault is situated. 424.

ADMINISTRATOR—

Discretion in appointment of an administrator for the estate of a deceased Italian, where the applicants are the Italian consul and

a stranger who is acceptable to the ineligible heirs. 225.

The fact that the bond for an administrator was signed in blank does not render it unenforceable. 257.

Fraud in procuring the signature of a surety can not be based on the claim of the surety that he believed he was signing the bond of G. when the application book of the probate court showed that it was G's wife who was seeking appointment, and that it was to her to whom the letters were issued. 257.

A consular agent of the Kingdom of Italy has neither an exclusive nor a naked right to appointment as administrator of the estate of an Italian subject dying intestate in this state, where one of the next of kin is a resident of the state. 593.

An Italian consular agent is entitled to notice of the death of a subject of the King of Italy only in case there are no known heirs in this country and he is himself a resident of the county in which the appointment is to be made or has a representative in such county who has been duly certified to the court. 593.

The probate court has no jurisdiction under Section 1064, G. C., to appoint an administrator for the estate of a decedent not an inhabitant of this state at the time of his death. 609.

Under the treaty with Austria-Hungary the probate court may appoint an administrator of the estate of a subject of that empire,

"not an inhabitant of this state," but who died here leaving an estate in this country. 609.

A chose in action in favor of a widow and next of kin for wrongful death is a part of the decedent's estate, though in a limited or qualified sense, and warrants the appointment of an administrator notwithstanding the decedent left no general estate. 609.

Administration of an estate is a proceeding *in rem*. and is a trust which the statute provides shall be administered through an administrator appointed by the court. 609.

ADVERSE POSSESSION—

Specific performance of a purchase of real estate can not be enforced where the only title the vendor can convey has been acquired through adverse possession. 208.

ALIENATION—

Of the affections of plaintiff's husband. 394.

AMENDMENTS—

An application for leave to amend a petition will be denied, where it appears that nothing could be stated by the plaintiff which would disclose a right of recovery. 416.

ANNEXATION—

As to the rate of fare from annexed territory to the municipal terminus of an electric road. 40.

APPEAL—

No right of appeal to the courts is given under the workmen's compensation act to one who is dissatisfied with the allowance made to him by the industrial commission of Ohio. 577.

APPEARANCE—

In a criminal or quasi-criminal proceeding service is obtained on the corporation by service of summons on one of its officers. 92.

If a corporation appears to present a motion other than that of lack of jurisdiction of the person, the appearance is voluntary. 92.

APPROPRIATION—

SEE EMINENT DOMAIN.

ASSESSMENT—

Against an interurban railway company for improvement of a portion of the highway annexed to the city after the road was built. 241.

ASSESSORS—

A woman is competent to serve as a deputy assessor under the Warnes law. 535.

ATTORNEY AND CLIENT—

An allowance of fees to an attorney will be determined by the merits of his claim, notwithstanding the *esprit de corps* of the profession prevents counsel from objecting to an allowance. 618.

AUTOMOBILES—

See MOTOR VEHICLES.

BANKS AND BANKING—

A sale of shares of the capital stock of a bank is valid and binding, although the seller retained the certificate and the shares were transferred on the books of the bank without surrender of the certificate in violation of a by-law of the bank. 184.

Presumption of ownership of stock from possession of uncanceled certificate rebutted by proof of sale of the shares. 184.

BENEFITS—

Action for recovery of, from a railway relief department; whether the plaintiff has been rendered "wholly unable to earn a livelihood" is a question for the jury. 604.

BIDS—

For a bridge superstructure; competitive bidding not destroyed, when. 229.

BOND—

Of an administrator, signed in blank, held to be enforceable. 257.

BRIBERY—

In a trial for bribery the court may properly, in determining the order of proof, direct that proof relating to the body of the alleged crime be introduced in advance of that relating to the *corpus delicti* or alleged general conspiracy. 117.

BRIDGES—

A bidder for a bridge superstructure is not limited to a bridge of the exact length specified by the preliminary resolution of the county commissioners. 279.

The principle of competitive bidding is not destroyed by the award of a contract for a bridge superstructure to a bidder whose plans call for a bridge a few feet shorter than that called for in the preliminary resolution. 279.

Functions of the joint committee, composed of the auditor, surveyor and commissioners; failure to award the contract on the day the bids are opened does not deprive the commissioners of jurisdiction; when the discretion of the commissioners has been properly exercised. 273.

BULK SALES—

The bulk sales law, relating to the transfer of a stock of merchandise and fixtures other than in the usual course of trade, is a valid exercise of the police power of the state and reasonable in its provisions. 599.

BURDEN OF PROOF—

The burden is always on the plaintiff to rebut the issue of his own negligence, whether sole or contributory. 302.

The burden of showing contributory negligence is always on the defendant. 302.

CEMETERY—

A cemetery association is not exempt from liability for the negligence of its agents and servants, notwithstanding it has no capital stock and no profits can accrue to its members. 49.

Right of action sustained of one who was injured by a fall on an icy walk within a cemetery while there in attendance at a funeral. 49.

CHARGE OF COURT—

It is probably error to charge on the subject of last chance, where it has not been made applicable by any allegation of the petition and there is nothing to indicate that the plaintiff was in a place of danger, except the fact that he was crossing a street railway track. 289.

Where there is an issue as to negligence, it is proper to say to the jury, "if both were at fault, the plaintiff can not recover." 302.

CHATTEL LOANS—

The loaning of money on chattel or personal property of any kind, without first having obtained a license therefor, is a punishable offense; attempted evasions. 625.

CHOSE IN ACTION—

A chose in action in favor of a wife or next of kin for wrongful death is a part of the decedent's estate in a limited sense, and warrants the appointment of an administrator regardless of whether the decedent left a general estate. 609.

CIVIL SERVICE—

The last paragraph of Section 10 of the civil service act of May 10, 1913, is not repugnant to the Constitution of the state as an exercise of the appointing power or because not of uniform operation throughout the state. 337.

The provision in this paragraph for a continuance in service of

incumbents who have not been appointed under previous civil service laws, conditioned upon their passing non-competitive examinations, is in harmony with the constitutional provision for the establishment of civil service in this state, and is not obnoxious to the constitutional provision against the creation of a privileged class, or a denial of the equal protection of the law. 337.

The Ohio civil service act is constitutional. 385.

Power is conferred upon the state civil service commissioner to investigate the mayor of a city with reference to the enforcement by him of the civil service law rules prescribed thereunder; the power of investigation is co-extensive, in time, which the taking effect of the act. 385.

Delegation of power under the civil service law in administrative matters. 385.

Authority to omit examinations, where qualifications of a scientific or professional character are required, is not a grant of power to suspend the law, which power is vested exclusively in the General Assembly. 385.

The authority granted by Sections 20, 21 and 28 to fix rules, duties, compensation for assistants and penalties for violations do not, if invalid, affect the constitutionality of the act in its general and dominant provisions. 385.

The civil service act of 1913 (Sections 486-1, *et seq.*), so far as it relates to incumbents of offices and places mentioned in the third paragraph of Section 10, went into effect January 1, 1914. 438.

The terms of such public offices and positions as are fixed by statute remain unchanged by this act, and an incumbent while protected from removal, suspension, reduction or transfer, except for cause as therein provided, is not thereby given a new term of office,

nor is his existing term lengthened or extended. 438.

Incumbents of offices whose statutory terms expired December 31, 1913, were not continued in office by this act. 438.

Sufficiency of indictment charging the solicitation of contributions from employees in the classified service. 499.

Mandamus lies to restore to office a discharged municipal employee, when; whether good faith was shown in investigating the case and making the discharge is the only question which may be inquired into. 630.

COMPENSATION—

Construction of statute fixing the rate of compensation to be paid to county commissioners. 582.

CONTINUANCE—

The custom of withdrawing a juror and continuing the cause is obsolete; in such a case the entire jury should be discharged. 621.

After the jury has been sworn a continuance can not be granted upon bare request, nor can it be based upon discretion of the court, but must be founded upon some statutory necessity or reason. 621.

CONSTITUTIONAL LAW—

The act providing for the registration of motor vehicles (103 O. L., 762) is discriminatory in its application, embodies double taxation, betrays an evident purpose to raise a fund for road and general purposes under the guise of regulation, and is invalid. 17.

The amendment of 1912 to the state Constitution, providing for licensing of the traffic in intoxicating liquors, does not change the policy of the state from that which obtained under the Constitution of 1851, by placing the traffic upon the same basis as other lines of business, but on the contrary

places further burdens upon this traffic and restricts the number of persons who may engage therein. 129.

The prohibition by the state, in a proper exercise of the police power, of any business, calling or occupation which affects injuriously the health, good morals, peace or safety of society, is not in conflict with the Fourteenth Amendment of the Federal Constitution. 129.

The provisions of the liquor license law (103 O. L., 216), requiring that applicants for licenses shall be of good moral character, permitting the granting of licenses to corporations, limiting the licensing of saloons to one for each five hundred inhabitants, and giving preference to those engaged in the traffic prior to May, 1912, are not in contravention with the state Constitution; nor is there a grant of legislative power in the provision which invests licensing boards with authority to pass upon the moral character of applicants for licenses to traffic in intoxicating liquors. 129.

The sections of the motor vehicle act as amended, providing a license fee for such vehicles and the application which shall be made of fees so received, are invalid for the reason that the act is a police measure while the amount at which the fees are fixed indicate an attempt to impose a tax for general revenue purposes. 193.

A vehicle tax which exceeds the cost of maintenance of the highways is invalid. 193.

The provision of Section 5653, General Code, for a transfer by the county of a portion of the surplus from the sheep fund to the society for prevention of cruelty to children and animals, is not an application of public funds for a private purpose, but is within the limitations of the state Constitution. 233.

Sections 1261-16 *et seq.*, providing for licensing traffic in intoxicating liquors, is not in derogation of the Fourteenth Amendment to the Federal Constitution, but is a valid and enforceable enactment. 321.

The last paragraph of the civil service act (103 O. L., 698), is not repugnant to the state Constitution as an exercise of the appointing power, nor is there lack of uniform operation, or creation of a privileged class, or denial of equal protection of the law. 337.

The state civil service act is valid in its general and dominant features; delegation of power in administrative matters. 385.

Construction of constitutional provisions with reference to a speedy trial of one charged with crime. 401.

Where conditions so change as to render a law without reason or effect, it is the province of the Legislature to repeal it rather than for the courts to attempt to strike it from the statute books. 545.

The fact that services under a legislative act are not performed or are not necessary, but the fees provided therefor are regularly collected, does not imply a legislative intent to provide a revenue measure by indirection which would not stand the constitutional test were its real purpose declared. 545.

Surplus revenue, derived from inspection under the police power and paid into the general revenue fund of the state, are not so disproportionate to the service involved as to render the measure invalid, where the surplus is not more than two or three times the expense incurred. 545.

Section 11102-3, known as the bulk sales law, is reasonable in its provisions and a valid exercise of the police power of the state. 599.

CONTRACTS—

Completion by a surety of a contract for the erection of a state building which had been abandoned before completion; funds in the hands of the state remaining due to the contractor can not be subject to claims against him for labor and material, but the amount so remaining due is payable to the surety who completes the contract. 149.

CORPORATIONS—

Prosecution of the president of a corporation for embezzling securities belonging to others. 65.

Service is obtained on a corporation in a criminal or *quasi*-criminal case by serving summons upon one of the officers as provided in Section 13607, General Code. 92.

As to employment of females over eighteen years of age more than ten hours a day, except in establishments engaged in the preparation for use of perishable goods. 92.

Where a corporation appears for purposes other than to attack the jurisdiction, the appearance is voluntary. 92.

The provision of the liquor license act permitting the issuing of saloon licenses to corporations is not invalid. 129.

Cancellation ordered of outstanding certificate of stock, shown by the stock ledger to have been canceled many years ago. 184.

Presumption of ownership of stock from possession of uncanceled certificate. 184.

Binding character of an agreement, sanctioned by all the stockholders, for the sale of realty. 377.

Finding as to whether the agreement involving the Harrison building in Columbus, at a valuation of \$225,000, was a sale of the property or was a loan for that amount. 377.

CRIMINAL LAW—

Conversion of securities by a corporation engaged in the brokerage business held to have been in this case the act of its controlling officer, against whom an indictment for embezzlement lies. 65.

Service upon a corporation in a criminal action; appearance of the corporation is voluntary, where for purposes other than to attack the jurisdiction. 92.

In case where the *corpus delicti* or body of the crime can not be directly established, except by gradual building up of the structure by proof of a general conspiracy which tends to establish it, the court may within its discretion permit the proof of the alleged general conspiracy in the order of the alleged steps tending to prove the body of the crime. 117.

Right of a defendant to a speedy trial and to discharge for failure to prosecute; discretion of the trial judge on motion to discharge for failure to prosecute; grounds which warrant a continuance. 401.

A plea in abatement must be made prior to the plea of not guilty, and where it is discovered during trial that the prosecuting witness has been incorrectly named in the indictment it is too late to interpose a plea in abatement. 433.

Sufficiency of indictment charging the solicitation of political contributions; wilful doing of a thing involves doing it with knowledge. 499.

The allegation that the defendant was "concerned" in a certain matter can not be so limited in meaning as to constitute a mere statement that he was interested in or anxious about said matter, but is a charge that he had a part in and was a joint actor in said matter. 499.

CROSSINGS—

Preferential rights of street crossings; construction of the provisions of the Cleveland ordinance with relation thereto. 561.

CRUELTY (Society of Prevention of)—

The statute authorizing a transfer of a part of the surplus from the sheep fund to the society for the prevention of cruelty to children and animals is a valid enactment. 233.

CORPUS DELICTI—

Proof relating to the body of the alleged crime may be introduced in advance of that relating to the *corpus delicti*, when. 117.

COSTS—

Failure to prepay costs in a divorce proceeding subjects the petition to a motion to strike from the files, notwithstanding prepayment was made subsequent to the filing of the petition. 73.

COUNTY COMMISSIONERS—

Procedure of, in awarding a contract for a bridge superstructure. 279.

Section 3001, General Code, as amended May 31, 1911 (Vol. 102 O. L., 514), fixing official year and rate of compensation to county commissioners construed. 582.

COVENANTS—

The fact that the grantor of a strip of land to the county for ditch purposes covenanted to hold the county "free and harmless from any and all claims to damages to his remaining property resulting from the use to be made of said strip," does not estop a successor in title from maintaining an action for damages on account of erosion of the banks of the ditch much beyond the line of the strip of land acquired. 472.

DAMAGES—

Whether an injured railway employee, who is suing for benefits

from the relief department, presents a case of total inability to earn a livelihood is a question for the jury; inability to earn a livelihood in such a case is not restricted to his previous occupation. 604.

DEFENSES—

Tendency of modern authority with reference to technical defenses by sureties. 257.

DELEGATION OF POWER—

The provision of the civil service act which empowers the commission to prescribe, amend and enforce rules for carrying the act into effect, which rules have the force and effect of law, is not a delegation of power to make laws, but of administrative powers and duties for the making of this particular act effective. 385.

DEMURRAGE—

Demurrage charges on a car load of freight which the consignee has refused to accept must be fixed at a reasonable sum; a demurrage charge for sixty-eight days disallowed. 513.

DESCENT AND DISTRIBUTION—

Among others than lineal descendants; among nephews and nieces and the children of nephews and nieces. 81.

Of the vested remainder, where devises are made in succession to various persons and objects. 97.

Of proceeds from real estate devised and afterward sold by the testator. 351.

DISCRETION—

It is within the sound discretion of the court to permit a reply to be filed at any state of the proceedings, and where the reply merely traversed averments of the answer setting up contributory negligence the defendant can not claim to have been taken by surprise. 289.

Where discretion has been exercised by a public official, it will not be interfered with by the courts, unless it appear that the official complained of has so acted that his action amounts to a fraud upon the public whom he serves. 297.

Of a trial judge upon application for discharge for failure to prosecute, where the applicant has been awaiting trial for more than three terms. 401.

DISCRIMINATION—

In the matter of taxation. 17.

DITCHES—

As to damages to an abutting owner on account of erosion of the banks of a county ditch; basis upon which a recovery may be had; issue must be raised *ex contractu*, not *ex delicto*. 472.

DIVORCE AND ALIMONY—

In the absence of an affidavit of inability so to do there must be prepayment of an amount sufficient to cover the probable costs in a divorce proceeding, and failure to make such prepayment subjects the petition to a motion to strike from the files, notwithstanding such prepayment was made subsequent to the filing of the petition. 73.

A decree of divorce will not be reopened for the purpose of awarding alimony to the defendant wife, on the ground that she was without knowledge of the pendency of the suit until after the decree had been rendered, where it appears that the proof of publication was mailed to the correct address, but failed to reach her for the reason that she was not known at that address by her correct name but was living under an assumed name. 586.

DOWER—

Of common-law wife in her deceased husband's estate. 189.

EASEMENT—

Nature of and mode of their creation and the extent to which they will be protected; easement created by mortgage. 481.

Where the owner of a piece of property erects thereon two houses, the first of which is accessible only through the second, the severance of joint ownership by mortgage of the first will be as effective to pass the easement to the mortgagee as an absolute conveyance by deed. 481.

A mortgage conveying the estate on condition gives the mortgagee the benefit of the doctrines applicable to *bona fide* purchasers for value. 481.

EMBEZZLEMENT—

Of securities by the president of a corporation engaged in the brokerage business. 65.

EMINENT DOMAIN—

A railway company may appropriate land for platform purposes about a depot, when. 56.

At the preliminary hearing the probate court may determine: (1) the existence of the corporation; (2) its right to make the appropriation; (3) inability to agree as to the amount to be paid for the land; (4) the necessity for the appropriation, and such collateral questions as may be necessary and incident to a determination of these issues. 56.

The rule that accord resting on mutual promises is not good without performance is applicable to a case for appropriation of land. 56.

The question of the necessity for the appropriation rests primarily with the corporation, and unless there is a clear abuse of power the court upon preliminary hearing will not interfere. 56.

EMPLOYERS' LIABILITY INSURANCE—

The new workmen's compensation act does not create liability

on the part of an employer who is without fault. 45.

Where an employee is injured from a fall caused by a fellow-employee mischievously pulling his stool from under him, there is no liability on the part of the master. 45.

The provisions of the workmen's compensation act extend only to the injured workman, or to his personal representative in case of his death. 123.

The term "personal injuries" as used in the workmen's compensation act includes occupational diseases. 273.

It is negligence for an employer to fail to warn a servant, who is put to work with white lead or other material from which poisoning may result, that personal cleanness is of utmost importance if he would avoid injury to his health. 273.

It is a question whether the industrial commission has authority to reopen a case which it has once determined. 577.

EQUITY—

Will relieve against forfeiture of a lease for breach of one of its conditions, when. 161.

Relief denied to the conditional assignee of a life insurance policy who had taken unwarranted steps to compel payment of the proceeds of the policy into court and the interpleading of several defendants. 476.

ERROR—

It is not error to fail to read the pleadings to the jury or to send them to the jury room, where the issues were correctly stated in the charge of the court. 289.

ESTATES OF DECEDENTS—

In the matter of appointment of an administrator for the estate of a deceased Italian, it is within the discretion of the probate judge as to whether the Italian consul or a stranger who is acceptable to in-

eligible heirs shall be named. 225.

But where the heir of a decedent is eligible, letters necessarily should be issued to him. 225.

Provisions of the Italian and Swedish treaties. 225.

As to the rights of an Italian consul with reference to appointment as administrator of a deceased subject of the Kingdom of Italy. 593.

ESTOPPEL—

Not applicable to other persons similarly situated to the plaintiff whose case has been decided, where they desire to prosecute their separate and distinct legal rights. 517.

EVIDENCE—

It is not error in the cross-examination of a motorman, as to the striking of a vehicle by his car, to permit him to testify as to the equipment on his car and the kind of brake employed thereon. 289.

EXECUTOR—

See ADMINISTRATOR.

EXECUTORY CONTRACTS—

Unless an executory agreement of settlement between parties to a civil action is reduced to writing and signed by them, or acted upon, or duly entered as a judgment, it is null and void. 56.

FEEES—

The fixing of, in a receivership, should be with reference to the merits of the claim presented. 618.

FEMALES—

As to employment of females over eighteen years of age more than ten hours a day or fifty-four hours a week. 92.

FLORISTS—

Must return plants and growing stock for taxation. 33.

FORFEITURE—

Of a lease for breach of one of its conditions—see **LEASE**.

FRANCHISE—

Authority of a village in granting an interurban franchise to fix the rate of fare beyond its boundaries. 40.

FRAUD—

In procuring a judgment is not shown by evidence that plaintiff had denied liability and defendant had charged the account to profit and loss, where plaintiff is not able to show that notice had been received by the defendant not to sell any more goods on plaintiff's account to the party who contracted the debt. 555.

HUSBAND AND WIFE—

A wife can not recover, from one whose negligence caused the injury to her husband, for loss of wages due to the fact that she gave up her separate employment to nurse him, but she is entitled to damages for loss of consortium. 123.

Common-law marriage sufficiently established, when; dower interest of common-law wife in deceased husband's estate. 189.

An action may be maintained by a wife against another woman for the alienation of her husband's affections, without proof of actual separation, if it be shown that there has been a loss of consortium. 385.

INDUSTRIAL COMMISSION—

See **EMPLOYERS' LIABILITY INSURANCE**.

INJUNCTION—

To entitle a plaintiff to a temporary injunction, it must appear that the facts stated in the petition are such as entitle him to a permanent injunction, if established by evidence to be subsequently submitted. 297.

Against interference by strikers; necessary parties to such a proceeding. 353.

Is the proper remedy against a public officer who assumes or threatens to exercise power not conferred upon him by law or conferred by an invalid statute, where such action will result in serious injury to a private citizen. 385.

Sureties on injunction bond released by release of the levy after the granting of the injunction. 460.

INJURED EMPLOYEE—

May be without remedy if dissatisfied with the allowance made to him by the industrial commission. 577.

INSURANCE (Life)—

In a mutual insurance company a member is reinstated upon favorable report being made by a medical examiner, when. 266.

The general powers of an officer of a mutual insurance company do not authorize him to perform an act hostile to one or more of its members. 266.

Unwarranted steps to compel payment of proceeds of policy to one holding a conditional assignment; relief in equity denied and the assignee relegated to such remedies as he may have at law. 476.

INTERURBAN RAILWAYS—

An interurban railway is bound by a provision granting it the right to lay its tracks through a village, that in the event of the village being annexed to the adjacent municipality the rate of fare shall be only five cents from the village to the municipal terminus of the road. 40.

Authority of a village to fix rates of fare beyond its own boundaries. 40.

Power of a municipality over the location of tracks on a portion

of the highway annexed to the city after the road was built; assessment against the company for improving such highway. 241.

INTOXICATING LIQUORS—

The policy of the state with reference to the liquor traffic was not changed by the constitutional amendment of September, 1912, but additional burdens were imposed upon the traffic and the number of those who may engage therein was restricted. 129.

The provisions of the liquor licensing law (103 O. L., 216) are not open to constitutional objection, nor does the investing of licensing boards with authority to pass upon the moral character of applicants for licenses involve a grant of legislative power. 129.

Where the only reason for rejecting an application for a liquor license is that the constitutional quota has been filled, the endorsement of "full quota" on the application is a sufficient statement of the reason for rejection. 305.

But an applicant who has been refused a license because the quota is full is entitled to a hearing by the county licensing board, the same as though rejected for any other reason. 305.

A rejected applicant has the right to register protests, both against the granting of certain licenses and for the revocation of other licenses, and mandamus lies against the county board to compel it to allow him to register such protests. 305.

The effect of the amendment to the state Constitution, of September, 1912, is not to relieve the business of trafficking in intoxicating liquors from any of the burdens theretofore placed upon it, nor does it place this traffic on the same footing as other callings and occupations, but on the contrary further restrictions and burdens were placed upon the business with a limitation on the num-

ber and class of persons who may engage therein. 321.

Neither is said amendment, nor the act of the Legislature passed in pursuance thereof, in derogation of the Fourteenth Amendment of the Federal Constitution. 321.

Local option in residence districts of municipal corporations; making territory "dry" by petition; technical irregularities and description and map of the territory proposed; when a second petition may be filed, where the first has been declared insufficient for irregularities or for lack of a sufficient number of signatures. 367.

If a petition appears on its face to contain the requisite number of legal signatures, the *prima facie* showing of its sufficiency thus afforded must be rebutted or overcome by the contestants or objection thereto on that ground will not lie. 367.

JOINDER—

Two or more defendants charged with a joint duty toward an employee may be joined for negligent breach of such duty resulting in his injury, although the negligence of one was nearer to the injury in point of time than the negligence of the other. 123.

JUDGMENT—

Will be granted in favor of the defendant on the petition and the statement to the jury on behalf of the plaintiff, when. 416.

Fraud in the procuring of, is not shown, when. 555.

Ground in equity for setting a judgment aside is not shown by evidence that the defendant was in Europe at the time summons was left at his place of residence and was not aware that suit had been brought against him until after judgment had been rendered. 555.

Nor is such a showing sufficient to warrant the setting aside of the

judgment on the ground of unavoidable casualty or misfortune preventing the making of a defense. 555.

Modification of a judgment for alimony denied in a divorce proceeding, where it appeared that the wife's failure to receive notice of the pendency of the suit was due to the fact that she was living under an assumed name. 586.

JUDICIAL SALES—

The title of a trustee to property purchased in a judicial proceeding is not necessarily reduced to a life estate by failure to include words of perpetuity in the granting and habendum clauses of the deed. 208.

LABOR—

The inhibition of Section 1008, against the employment of females over eighteen years of age more than ten hours a day or fifty-four hours a week, except in canneries or establishments engaged in the preparation for use of perishable goods, applies to candy factories. 92.

The fact that goods could not be manufactured during the summer season in a quantity sufficient for the holiday trade is not a defense under this act for working females overtime later in the year. 92.

LANDLORD AND TENANT—

Construction of lease with reference to the obligation of the lessees to erect a new building. 161.

The failure to record the assignment of a lease within a reasonable time, although a technical breach of its conditions, may be relieved against where it appears that the lessor suffered no prejudice and the condition as to recording has since been complied with. 161.

So also with reference to a breach of a covenant to keep the premises insured, relief to the lessees may be granted, where it appears that the breach consisted only of failure to validate the policies by notifying the companies of an assignment of the lease, and was not wilful or the result of gross negligence, and the insurance has since been made good, and the lessor suffered no prejudice. 161.

LAST CHANCE—

See NEGLIGENCE.

LEAD POISONING—

Where suffered by an employee in the course of his employment; constitutes a personal injury within the meaning of the workmen's compensation act. 273.

LEASE—

Relief against the forfeiture of a lease may be granted by a court of equity, where the breach was not wilful or the result of gross negligence. 161.

Construction of a lease with reference to the obligation on the part of the lessees to erect a new building. 161.

LEGISLATIVE POWER—

The provision in the intoxicating liquor license law, which invests licensing boards with authority to pass upon the moral character of applicants for licenses, is not a grant of legislative power. 129.

LICENSE—

As to applications for licenses to sell intoxicating liquors—see INTOXICATING LIQUORS.

In fixing license fees for motor vehicles the amount of the fee required for registration should not exceed the reasonable cost of police surveillance and of the maintenance and repair of the roads. 193.

Validity of the state intoxicating liquor license law. 129.

LIEN (Mechanic's)—

A mechanic's lien filed on property belonging to the state is void. 149.

The loaning of money on chattel or personal property of any kind, without having first obtained a license therefor as required by statute, is a punishable offense notwithstanding the paper which was signed by the borrower and which he was led to believe was a mortgage, was not in fact a mortgage or valid instrument which could be enforced against him. 625.

LOCKOUT—

See **STRIKES**.

MANDAMUS—

Lies to compel a county licensing board to grant a hearing to a rejected applicant for a liquor license and to register protests. 305.

Lies to restore a discharged municipal employee to office, when. 630.

A writ of mandamus can issue to a public officer only when a clear legal right in favor of the relator and a plain dereliction of duty on the part of the officer have been established. 630.

MASTER AND SERVANT—

The new workmen's compensation act does not create liability upon the part of an employer who is without fault. 45.

An employer is not liable under the workmen's compensation act for an injury to an employee, caused by a mischievous act by a fellow-employee not in the course of his employment. 45.

A master does not lose his common law defenses by reason of the provisions of the workmen's compensation law, where the injury of which the servant complains was received in the course of his employment in West Virginia. 529.

MERGER—

Of the legal title in an action on a note or in foreclosure. 541.

MISNOMER—

Of prosecuting witness not available as ground for a plea in abatement where not discovered until the taking of testimony has been begun. 433.

MORTGAGE—

The common law doctrine as to mortgage prevails in Ohio, and the mortgage conveys not only the naked title but the necessary incidents thereto. 481.

Application of the rule where the mortgaged premises and the servient tenement were continuously the property of the mortgagor. 481.

Legal title in a mortgagee distinguished from that in a grantee; rights passing to the successor in title. 541.

The right of action on a note secured by a mortgage is merged in the finding of the amount due in the action to foreclose; but there is no merger of the legal title in the action on the note or in foreclosure. 541.

MOTOR VEHICLES—

The act providing for the registration of motor vehicles (103 O. L., 763) is unconstitutional. 17.

Proximate cause of an automobile being struck by an interurban car at a highway crossing. 31.

An act providing for the registration of motor vehicles is invalid if the fees prescribed exceed the reasonable cost of police surveillance and the maintenance and repair of the highways. 193.

The owner of an automobile, operated at reasonable speed while passing round a slowly moving wagon, is not liable for injury to a boy who dropped off the rear of the wagon after he had observed the machine and was struck by it. 435.

Reckless disregard of the rights of others on the part of automobile drivers has become a serious menace; construction of the Cleveland ordinance with reference to preferential rights at street crossings; common law still in force, when. 561.

It is negligence *per se* to drive a vehicle in a much frequented or built up portion of a city, that is so covered or so constructed or loaded as to prevent the driver having an adequate view of the traffic in the street on both sides of and following his vehicle. 561.

A preferential right at a street crossing is not exclusive, and only entitles the driver so preferred to cross first in the event of his having arrived first at the crossing. 561.

MUNICIPAL CORPORATIONS—

Where the whole of a vacated street had been dedicated by the property owners on one side, the property owners on the opposite side are entitled to an easement only in the vacated street, the fee being in the grantors of such street and their grantees. 75.

Authority is vested in a municipal council to authorize the laying of a spur railway track thirty-two hundred feet in length from which numerous private sidings will branch off to nearby factories. 219.

The authority conferred by Section 8902, is not limited to the construction of a track to a single "mill, factory or other manufacturing establishment," but is broad enough to cover the plural of those words and to include streets as well as a single street. 219.

Injunction lies to prevent an assessment against an interurban railway for improvement of a highway through territory annexed to the city after the road was built, when. 241.

But the municipality can not be enjoined from relocating the

tracks in that portion of a highway so annexed. 241.

A municipal corporation is not liable for an injury caused by a fall upon a sidewalk, rendered slippery by a deposit of mud washed down from an adjacent hillside during a heavy rain, where it does not appear that there was reasonable opportunity to remove the deposit after the rain. 252.

A municipality is not required to go outside of the line of the street and sidewalk, upon private property, and construct retaining walls or other devices for the purpose of preventing mud and rock from washing upon the sidewalk. 252.

A municipality is required to exercise reasonable care only in keeping its streets and sidewalks free from obstructions. 252.

The validity of an ordinance granting the right to lay five railway tracks across a public street depends upon the reasonableness of the use of the street in that manner, making the question one of fact which must be determined from all the circumstances of the case. 317.

Failure of the railway company to restore a street to its former condition does not render inoperative the grant of the right to maintain its tracks. 317.

The state civil service commission may investigate the mayor of a city with reference to his conduct in the enforcement of the civil service law and the rules prescribed thereunder. 385.

Where a *de facto* officer has been paid the salary attaching to the office, the *de jure* officer can not enforce payment to him of the amount falling due while he was excluded from the office. 517.

NEGLIGENCE—

A reasonably prudent person would not drive an automobile

upon the track of an interurban road, after stopping at a point where he could not see whether or not there was a car approaching, when the circumstances were such that he could easily have so placed himself as to have seen the approaching car or by stopping his engine could have heard it; failing to do so, his contributory negligence became the proximate cause of his injury from being struck by the car. 31.

Right of action sustained against a cemetery association by one who was injured by a fall on an icy walk within the cemetery while there in attendance upon a funeral. 49.

Joinder of defendants charged with a joint duty toward an employee may be had, although the negligence of one was nearer in point of time to the injury than the negligence of the other. 123.

To whom the workmen's compensation act extends; a wife can not recover for services in nursing injured husband, but is entitled to damages for loss of consortium. 123.

An action for damages for injuries can not be maintained by one who has received payment in full settlement therefor, without first tendering back the sum so received, when. 157.

Where an employee is put to work with white lead and other material under circumstances requiring unremitting care to avoid injury to his health through uncleanness, adequate warning must be given him of the danger of uncleanness or liability arises for negligence in failing so to do. 273.

Under the workmen's compensation act the term "personal injuries" includes occupational diseases. 273.

Status of a case where the question of last chance was not alleged in the petition, but may

have been raised by the evidence. 289.

Determination as to negligence, where a vehicle was struck by an electric car. 289.

The burden is always on the plaintiff to avoid or rebut the issue of his own negligence, either sole or contributory. 302.

When the defendant sets up contributory negligence, he admits his own negligence and seeks to avoid its consequences because the plaintiff was also at fault; the burden of ascertaining this contributory negligence is upon the defendant. 302.

In actions based on negligence and allegations of contributory negligence, it is always proper for the court to say to the jury, "If both were at fault, the plaintiff can not recover." 302.

Where it appears that the plaintiff left his seat in the car a square distant from the point where he expected to alight, and took his stand on the running board, and was struck and injured by a wagon which was in full view and which the car passed while running at the usual rate of speed, judgment will be given for the defendant company. 416.

Owner of automobile not liable for injury to a boy who dropped off the rear of a wagon in front of the machine which he saw approaching. 435.

The workmen's compensation act does not apply in case of an injury received by an employee in the course of his employment in West Virginia, although both employer and employee are residents of Ohio; such an employer is not deprived of his common law defenses. 529.

To drive a vehicle through a crowded street, which is so loaded or covered as to prevent the driver having a full view of the traffic in the street on both sides and following him, is negligence *per se*. 561.

NOISE—

See **NUISANCE**.

NOTICE—

To discontinue selling goods to B on account of A must be shown before A will be relieved from liability to the seller on account of such purchases. 555.

NUISANCE—

The noisy operation of a factory in a residence neighborhood may be enjoined, notwithstanding a nearby railroad upon which many trains are operated (contributes to the general disquiet of the neighborhood. 1.

An action by a property owner against the owner of the adjacent property for damages on account of the escape onto the plaintiff's premises of filth from a vault, causing loss of use of plaintiff's property, is an action for nuisance and not an action for trespass. 424.

Such an action abates with the death of the owner of the premises upon which the vault was maintained and during whose lifetime the damages complained of were suffered. 424.

OCCUPATIONAL DISEASES—

Are included in the term "personal injuries" as used in the workmen's compensation act. 273.

OFFICE AND OFFICER—

See **CIVIL SERVICE**; also see **MANDAMUS**, as to when the writ lies against a public officer.

A public officer will not be interfered with by the courts in the exercise of his official discretion, unless. 297.

Injunction is the proper remedy against an officer who assumes or threatens to exercise power not conferred upon him by law or conferred by an invalid statute. 385.

Construction of the salary law with reference to compensation to

sheriffs for keeping and feeding prisoners. 505.

The current of authority is to the effect that a *de facto* officer can not maintain an action for the recovery of salary, but where the salary has been paid to the *de facto* officer the *de jure* officer may maintain an action for its recovery from him. 517.

A *de jure* officer can not enforce payment to him of the salary of the office which has been paid to the *de facto* officer during the period he was excluded from office. 517.

A deputy assessor of property for purposes of taxation, appointed under the Warnes law, is not an officer and the position which he holds is not an office within the meaning of the state Constitution; and a woman is therefore eligible to appointment to that position. 535.

OFFICIAL STENOGRAPHER—

The term of an official stenographer is for three years, and can be for no other period, and the appointment becomes final the moment the appointee qualifies. 196.

OIL INSPECTION—

Validity of the oil inspection statute, which has fallen into disuse. 545.

ORDINANCE—

See **MUNICIPAL CORPORATIONS**.

PARTIES—

Necessary parties to an action to enjoin strikers from interference with the business of their employer. 353.

PLEADING.

In an action for recovery of the amount due on a promissory note, a motion does not lie to strike from the petition the written guaranty by the defendant of payment of the note forming the basis of the claim. 85.

Setting out *in haec verba* the instrument upon which claim is made. 85.

Failure to read the pleadings to the jury or to send them to the jury room does not constitute error, when the issues have been correctly stated in the charge of the court. 289.

It is within the discretion of the court to permit a reply to be filed at any stage of the proceedings. 289.

POLICE—

A police officer has no right to search one passing peaceably along a street of a municipality until the person suspected has been arrested, and there must be reasonable and probable grounds to justify the arrest. 273.

POLICE POWER—

The proper purpose of a motor vehicle registration law is police regulation for the welfare and safety of the people; such an act is not a license, but a mere regulation of an admitted right. 17.

Proper exercise of police power in the regulation of the liquor traffic. 129.

PRESUMPTION—

As to the cancellation of mortgages covering property sold at judicial sale. 208.

PROMISSORY NOTES—

In an action on a promissory note, a motion does not lie to strike from the petition the written guaranty of the defendant of payment of the note. 85.

PROPERTY—

Factory noises which affect property values may be abated by injunction. 1.

PROXIMATE CAUSE—

Contributory negligence on the part of the driver of an automobile held to have been the proximate cause of his being struck by an interurban car at a highway crossing. 231.

PUBLICATION—

Distinguished from "acknowledgment." 465.

PUBLIC CONTRACTS—

A tax-payer who is evidently only a figurehead for an unsuccessful bidder will not be heard to complain, where he rests his claim upon the dividing of the contract among four persons, against only one of whom is relief sought. 297.

The courts will not interfere with the discretionary power of public officers in the award of contracts, unless it appears that their action will amount to a fraud upon the public. 291.

RAILWAYS—

A railway company which has been duly incorporated and has complied with the law granting it the power to appropriate land may make an appropriation for platform purposes about a depot. 56.

Validity of an ordinance for the construction of proposed tracks within municipal limits. 219.

Validity of ordinance granting railway the right to lay five tracks in a public street. 317.

As to demurrage on a car load of freight which the consignee has refused to receive. 413.

Whether an injured employee, suing for benefits from the relief department is "wholly unable to earn a livelihood" is a question for the jury; in such a case his ability to earn a livelihood will not be restricted to his former occupation. 604.

REAL ESTATE—

Determination as to whether the agreement involving the Harrison building in Columbus at a valuation of \$225,000 was a sale of the property or a loan for that amount. 377.

RECEIVER—

Fees will not be allowed to the attorney for the plaintiff in a receivership, unless plaintiff or his counsel have rendered services the effect of which is to conserve or add to the fund; and where plaintiff participated in acts which diminished the fund no fee will be allowed to his counsel. 618.

REGISTRATION—

Of motor vehicles; act providing for, rendered invalid by discrimination and otherwise. 17.

REMAINDER—

Distribution of the vested remainder where devises are made in succession to various persons and objects. 97.

RESCISSION—

Of contract—see **CONTRACTS**.

RES ADJUDICATA—

A decision in a given case is *not res adjudicata* in another similar case and does not estop other persons who are similarly situated from prosecuting their separate and distinct legal rights. 517.

ROADS—

The repair of the public highways is provided for by general law and the effort to raise a fund for road purposes from the registration of motor vehicles rendered the act providing for such registration unconstitutional. 17.

An excise tax for the use of the highways must not exceed the reasonable cost of keeping the said highways in repair. 193.

SCIENTER —

The wilful doing of a thing involves doing it with knowledge. 499.

SHEEP FUND—

Statute authorizing transfer of part of surplus from sheep fund to the society for prevention of cruelty a valid enactment. 233.

SHERIFF—

Compensation of, for keeping and feeding prisoners. 505.

SIDEWALK—

A municipality is required to exercise only reasonable care in keeping its sidewalks free from obstructions. 252.

SOVEREIGNTY—

Is waived by the state in a civil proceeding when the state is asking protection as to claims which are being asserted against its property. 149.

SPECIFIC PERFORMANCE—

A court of equity will not decree specific performance of a contract for the purchase of real estate, where the only title the vendor can convey has been acquired through his adverse possession under a statute of limitations. 208.

STATE—

Where a state goes into court to ask protection as to claims which are being asserted against its property, the immunity of a sovereign is voluntarily waived. 149.

A mechanic's lien, filed on property belonging to the state, is void; and a proceeding does not lie to subject funds in the hands of the state to payment of claims for work and material which went into a state building under a contract which was abandoned before completion. 149.

Where work on a state building is abandoned by the contractor and the contract is completed by his surety, the amount remaining due him is payable to the surety, and can not be reached by creditors of the derelict contractor who hold claims for work and material which went into the building. 149.

STATUTES CONSIDERED—

Section 5560, providing how each separate parcel of land shall be returned for taxation. 33.

Section 5325, defining personal property. 33.

Section 5328, providing what property shall be subject to taxation. 33.

Section 5376, providing what the statement of personal property returned for taxation shall contain and the order thereof. 33.

Section 1465-60, forming a part of the workmen's compensation act. 45.

Section 11981, providing for prepayment or security for costs in divorce and alimony proceedings. 73.

Section 11333, providing when copies of written instruments shall be filed with pleading. 85.

Section 11334, relating to pleading on an instrument for payment of money. 85.

Section 11305, providing what a petition must contain. 85.

Section 1008, requiring that seats be furnished for female employees. 92.

Section 13607, relating to summons and indictments against corporations. 92.

Section 5257 *et seq.*, of the state armory act. 149.

Section 6294, relating to applications for registration of motor vehicles. 193.

Section 3609 (6309), relating to the distribution of fees received for motor vehicle registration. 193.

Section 8895, relating to crossings of railway tracks above or below grade. 219.

Section 8902, relating to the construction of additional tracks and railway tracks and switches. 219.

Section 5653, relating to distribution of surplus from sheep fund. 233.

Section 2344, relating to contracts for erection of bridge superstructures. 279.

Section 2345, relating to contracts on other plans for bridge superstructure. 279.

Section 2350, relating to approval of plans for bridge. 279.

Sections 1261-16, General Code, providing for the issue of licenses to traffic in intoxicating liquors. 129, 305 and 321.

Section 10237, relating to the service of summons. 332.

Section 486-10, known as the civil service act. 337.

Section 6140, *et seq.*, relating to local option in residence districts. 367.

Section 486-1, *et seq.*, known as the civil service law. 385 and 438.

Section 5388, providing rules for valuing personal property generally for purposes of taxation. 499.

Section 5404, relating to corporation returns for taxation. 449.

Section 5405, relating to valuations made by the county auditor. 449.

Section 10505, providing how a will shall be made. 465.

Section 2977, providing that fees, costs and percentages shall be for the use of the county. 505.

Section 2997, providing that the county commissioners shall make an additional allowance to the sheriff quarterly for keeping and feeding prisoners. 505.

Section 3179, providing that federal prisoners may be confined in county jails. 505.

Section 1465-37 *et seq.*, known as the workmen's compensation law. 529.

Sections 11102-3, known as the bulk sales law. 599.

Section 10604, providing what court shall grant letters of administration. 609.

Section 10770, providing a right of action for causing death. 609.

Section 10772, providing parties and limitation of damages for wrongful death. 609.

Section 11453, providing when a jury may be discharged without having returned a verdict. 621.

Section 11454, providing when a case may be retried if the jury has been discharged before verdict. 621.

Section 6346-1, providing who may make loans on chattels or purchase wage earnings. 625.

STREETS—

To whom land reverts when a street is vacated where all the land was dedicated by property owners on one side. 75.

Whether or not it is a reasonable use of a public street to permit the laying of five railway tracks therein is a question of fact which must be determined from all the circumstances of the case. 317.

STREET RAILWAYS—

See INTERURBAN RAILWAYS.

STRIKES—

Combinations of workmen and the means they may use in enforcing their demands; picketing, persuasion and the maintaining of patrols in front of an employer's premises; injunction against interference by strikers and parties to such a proceeding. 353.

SUBMISSION—

A court may dismiss the jury and consider the cause on submission, and its finding will take the place of a verdict by a jury, when. 266.

SUBROGATION—

Sureties released by reason of being deprived of their remedy by subrogation. 460.

SUMMONS—

The filing of a motion to quash service of summons on grounds other than lack of jurisdiction is an appearance. 92.

Service of summons must be of such a character that it may

fairly be presumed the defendant received it; where the service is not personal, a copy of the summons with all the endorsements thereon must be pushed under the front door of the defendant's residence, or dropped into an aperture of the front door for the reception of mail, so that it may be said the summons was left within the dwelling; or if it be delivered to some member of the family, the one receiving it must be of such age and discretion and bear such relation to the defendant that it may fairly be presumed he received it, and delivery made to a member of the family must be at a door of the defendant's residence or on a porch thereof. 332.

Service held invalid where the summons was pinned on the back door of the defendant's residence. 332.

SURETIES—

Where further proceedings for recovery on a judgment are enjoined, and the plaintiff then releases the levy, the sureties on the injunction bond are released. 460.

Where the contract for the erection of a state building is abandoned before completion and the work is completed by the surety, the amount in the hands of the state remaining due to the contractor is payable to the surety and can not be reached by holders of claims for work or material which went into the building before the contract was abandoned. 149.

One who signs in blank the printed form of an administrator's bond consents by implication that the blank spaces shall be filled in, and in the absence of fraud he is liable on the instrument so executed. 257.

Tendency of modern authority with reference to technical defenses by sureties. 257.

A claim of fraud in securing the signature of a surety to an ad-

ministrator's bond can not be based upon the claim of the surety that he supposed it was the bond of G he was signing, when the application book in the probate court showed that it was G's wife who was seeking appointment, and it was to her that the letters were issued. 257.

TAXATION—

Can not be imposed under the guise of a registration act. 17.

The act providing for the registration of motor vehicles embodies double taxation, and for that among other reasons it is unconstitutional. 17.

The provision of Section 5560 that in assessing real estate for taxation the value alone shall be made "excluding the value of the crops growing thereon," does not classify such crops as either real or personal property, nor exempt them from taxation. 33.

Growing crops are sometimes considered in law as personalty and sometimes as realty. 33.

Growing plants and growing floral stock constitute a "growing crop," and such plants and stock is subject to be returned for taxation as personal property. 33.

No exemption of personal property from taxation can be read into the statute. 33.

Limitations on the power to levy an excise tax for the use of the public highway. 193.

The value of personal property for the purpose of taxation, whether belonging to an individual or corporation, should be based on its true value as property, and not on its value as a unit or going concern and with reference to the use made of it by the owner and profit derived therefrom. 499.

TENDER—

Where a compromise settlement has been made between an injured

person and the party causing the injuries, the latter denying liability but expressing a willingness to pay something to get rid of the matter, suit can not afterward be made by the injured person for damages without first tendering back the amount so received. 157.

TITLE—

Specific performance can not be enforced against one who acquired his title through adverse possession. 208.

Where the record of a foreclosure suit has been destroyed through fire or riot, and only the master commissioner's deed remains, a court will assume that the mortgages involved were ordered canceled and released of record. 208.

No claim or interest remains outstanding in mortgagees, even though their mortgages have not been released of record, where the deed of the master commissioner purports to convey all the right, title and interest, not only of the mortgagor, but also of all parties to the suit including the mortgagees. 208.

Where a master commissioner conveyed property to the trustee of a building association, "his successors and assigns forever," equity will decree that the trustee took a title in fee simple, if it was necessary for him to take such a title in order to fully perform the duties of his trust. 208.

If the interest of the person whose property is sold in foreclosure is an estate in fee simple, a conveyance by a master commissioner of all the title and interest of such owner and mortgagor passes an estate in fee simple, even though words of inheritance were not used in the deed. 208.

Legal title in a mortgagee distinguished from that in a grantee. 541.

There is no merger of the legal title in an action on a note or in foreclosure. 541.

TRESPASS—

Where property is damaged by an overflow of filth from a vault on the adjoining property, the action of the injured owner, is for nuisance and not for trespass. 424.

TRIAL—

Order of evidence where there is a necessity for relying on acts performed or declarations made for the purpose of building up the structure of proof of a general conspiracy. 117.

Right of a defendant to a speedy trial. 401.

A motion by the defendant for judgment, on the petition and the opening statement to the jury on behalf of the plaintiff, lies, where it appears from the petition and the said statement that a case is not being presented. 424.

Whether one suing for benefits has been rendered "wholly unable to earn a livelihood" is a question for the jury. 604.

If in a trial, after the jury is sworn, a legal reason appears for continuing the cause, the fiction of withdrawing a juror is not necessary, but the entire jury should be discharged. 621.

But in such a case a continuance can not be based on a bare request, nor can it be rested on the discretion of the court, but must be founded on some statutory necessity or reason. 621.

TRUST—

A trustee in the purchase of property takes an estate in fee simple, if it is necessary for him to take such a *quantum* of estate in order to fully perform the duties of his trust, when. 208.

VACATION—

Of streets; to whom the land re-

verts when it was all dedicated by property owners on one side. 75.

VAULT—

Damage to property from escape of the contents of a vault on the adjoining premises; an action for damages in that behalf is an action for nuisance; such a cause of action abates at the death of the owner of the premises upon which the vault is situated. 424.

VERDICT—

When in an action for money only all the parties request an instructed verdict, their action in that behalf amounts to a submission of the entire cause, law and fact, to the court, and the court may then on request of all parties dismiss the jury and consider the cause on submission, and its finding will take the place of a verdict by a jury. 266.

A verdict of \$7,000 for permanent injuries to a driver fifty-one years of age is excessive, where the injuries do not unfit him for the work he has been accustomed to perform, and the testimony presents a close question as to the liability of the defendant railway company. 289.

VILLAGE—

Validity of the provision in a grant for the laying of an interurban road through the village that in the event of the village being annexed to the adjacent municipality the fare to the municipal terminus of the road shall be only five cents. 40.

WAGES—

An evasion of the statute requiring one loaning money on wages to first take out a license therefor is a transgression of the statute and a punishable offense. 625.

WIDOW—

Nature of the estate taken, where there is power to sell and

consume if necessary for her "comfort, convenience and benefit." 97.

WILLS—

A testator who provides "all the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the residue of his estate shall be distributed the same as the property of an intestate. 81.

While the estate devised to a widow may be such that under some circumstances it would amount to more than a life estate, it is less than a life estate as that word is ordinarily understood, if the power and discretion confided in her to sell and use is subject to the limitation that the income if sufficient, and proceeds from sales if necessary, can be used only for "her comfort, convenience and benefit," and neither the income nor principal can be used by her in building up a separate estate. The legatees in such a case have a vested remainder in so much of the estate as remains unconsumed at the death of the widow. 97.

Where a testator sold real estate which he had previously devised, the proceeds can not be substituted for such real estate, unless so expressly directed by the terms of the will. 351.

Inasmuch as a will speaks as of the date of the death of the testator, a bequest to one of "all my personal estate left after my just debts and funeral expenses are paid," passes to such person all of the personal estate of the testator, notwithstanding a large portion thereof is money derived from the sale of real estate, by testator, subsequent to the execution of the will. 351.

No publication of a will is necessary; the witnesses need not know that the document is a will; acknowledgment and publication dis-

tinguished; proof required that the testator knew the nature of the instrument and realized that it was his last will and testament. 465.

WOMEN —

A woman is eligible to appointment as a deputy assessor of property for taxation under the Warnes law. 535.

WORDS AND PHRASES—

The term "personal injuries" includes occupational diseases under the workmen's compensation act. 273.

Meaning of the word "block" used in the statutes relating to the sale of intoxicating liquors. 367.

"During the month of January" construed to mean "throughout the month of January." 499.

Construction of the words "during" and "concerned." 499.

WORKMEN'S COMPENSATION ACT—

See EMPLOYER'S LIABILITY INSURANCE.

Provisions of, extend only to the injured workman or to his personal representative in case of his death. 123.

This act has no extra-territorial application, and there can be no recovery by an employee for an injury sustained in the course of his employment in West Virginia, notwithstanding the contract of employment was made in Ohio where both parties are resident. 529.

WORK AND LABOR—

See LABOR.

WRONGFUL DEATH—

Of a foreigner; authority of the probate court to appoint an administrator; chose of action in favor of the wife is a part of the estate of a decedent. 609.

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